



**DISCUSSION PAPER 118**

**STATUTORY LAW REVISION**

**(LEGISLATION ADMINISTERED BY  
THE DEPARTMENT OF RURAL DEVELOPMENT AND LAND REFORM)**

**PROJECT 25**

**AUGUST 2010**

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## Introduction

The South African Law Reform Commission (SALRC) was established by the South African Law Reform Commission Act, 1973 (Act 19 of 1973).

The members of the Commission are –

The Honourable Madam Justice Y Mokgoro (Chairperson)

The Honourable Mr Justice WL Seriti (Vice-Chairperson)

Professor C Albertyn

The Honourable Mr Justice DM Davis

Mr T Ngcukaitobi

Advocate DB Ntsebeza SC

Professor PJ Schwikkard

Advocate M Sello

The Secretary **of the SALRC** is Mr Michael Palumbo. The project leader responsible for this investigation is Professor Cathi Albertyn. The researcher assigned to this investigation is Mr Linda Mngoma. The Commission's offices are on the 12th Floor, Sanlam Centre, corner of Andries and Schoeman Streets, Pretoria.

On 30 July 2008, Ms MS Mabandla, the Minister of Justice and Constitutional Development, appointed the following advisory committee members who assisted the SALRC to, firstly, develop the Consultation Paper and, secondly, the Discussion Paper, namely:

Prof Jeannie van Wyk, University of South Africa

Professor Willemien du Plessis, University of North-West

Professor André van der Walt, University of Stellenbosch

Professor Juanita Pienaar, University of Stellenbosch

Professor Hanri Mostert, University of Cape Town

Professor Warren Freedman, University of KwaZulu-Natal

Professor Nic Olivier, University of Pretoria

Professor Jan Bekker, University of Pretoria

Correspondence should be addressed to:

The Secretary  
South African Law Reform Commission  
Private Bag X668  
Pretoria  
0001

Telephone: (012) 392 9563 or 0732689166  
Fax: 086 501 9217  
E-mail: LMngoma@justice.gov.za  
Website: <http://www.doj.gov.za/salrc/index.htm>

## **Preface**

This Discussion Paper has been prepared to elicit responses and to serve as a basis for the Commission's further deliberations. It contains the Commission's **preliminary** recommendations. The views, conclusions and recommendations which follow should not be regarded as the Commission's final views.

The Discussion paper (which includes a draft Bill entitled Rural Development and Land Reform General Laws Amendment and Repeal Bill) is published in full so as to provide persons and bodies wishing to comment with sufficient background information to enable them to place focused submissions before the Commission. A summary of preliminary recommendations and questions for comment appear on page (v). The proposed Rural Development and Land Reform General Laws Amendment and Repeal Bill is contained in Annexure A. Schedule 1 of the proposed Bill consists of Acts that may be amended to the extent set out in the forth column of the Schedule. Schedule 2 of the Bill consists of Acts that may be repealed as a whole, and Schedule 3 identifies specific provisions in the legislation that may be repealed. Annexure B contains a list of statutes (including those recommended for repeal in this document) currently administered by the Department of Rural Development and Land Reform (hereinafter the "DRDLR") enacted between 1910 and 2004. Annexure C is a categorization of Acts in accordance with the proposals made in relation to such Acts in this Discussion Paper, whereas Annexure D provides a brief overview of issues relating to pre-1994 land legislation.

The Commission will assume that respondents agree to the Commission quoting from or referring to comments of and attributing comments to respondents, unless representations are marked confidential. Respondents should be aware that the Commission may in any event be required to release information contained in representations under the Promotion of Access to Information Act 2 of 2000.

Respondents are requested to submit written comment and representations to the Commission by 30 November 2010 at the address appearing on the previous page. Comments can be sent by post or fax, but comments sent by e-mail in electronic format are preferable.

This Discussion Paper is available on the internet at [www.doj.gov.za/salrc/index.htm](http://www.doj.gov.za/salrc/index.htm). Any inquiries should be addressed to the Secretary of the Commission or the researcher

allocated to the project, Mr Linda Mngoma. Contact particulars also appear on the previous page.

Preliminary recommendations and questions for comments

1. The Commission has been mandated with the task of revising the South African statute book with a view to identifying and recommending for repeal or amendment legislation or provisions in legislation that are inconsistent with the Constitution, particularly the equality clause thereof, and those that are redundant or obsolete. Pursuant to this mandate, the Commission has established that there are 2800 Acts in the statute book. Furthermore, the Commission has identified 32 Principal Acts and 78 Amendment Acts as being statutes that relate to land administration and reform and that are administered by the DRDLR (see Annexure B). After careful and thorough analysis of the Acts administered by the DRDLR, the Commission proposes that:

- (i) The provisions of Acts set out in Schedule 1 of the proposed Rural Development and Land Reform General Laws Amendment and Repeal Bill (“the proposed Bill”), contained in Annexure A, be amended for the reasons set out in Chapter 2 of this Discussion Paper; and
- (ii) The Acts set out in Schedule 2 of the proposed Bill contained in Annexure A referred to above, be repealed as a whole for the reasons set out in Chapter 2 of this Discussion Paper;
- (iii) The provisions of Acts set out in Schedule 3 of the proposed Bill, found in the same Annexure referred to above, be repealed to the extent set out in that Schedule, for the reasons set out in Chapter 2 of this Discussion Paper;
- (iv) A review similar to this one undertaken in respect of land administration and land reform legislation is implemented as regards legislation relating to rural development (the brief of this Discussion Paper focuses on land administration and reform; the functional domain of the previous Department of Land Affairs (now DRDLR) has been enhanced by the addition of all rural development functions);
- (v) A review of all pre-1994 legislation relating to land tenure and/or land administration which, to a large extent, still forms the basis of current land practice in the former TBVC countries, the former self-governing territories and the former SADT land areas. Parts of this pre-1994 race-based land legislation have been assigned in terms of the provisions of the (interim) Constitution of the Republic of South Africa 200 of 1993 to the provinces

concerned. Many of these legislative instruments were published by means of proclamations, regulations or notices. The list of statutes administered by the DRDLR does not contain any references to this legislation (see Annexure B); and

- (vi) A future statutory review process is conducted related to various general discrepancies and needs in land reform legislation, generally, as is further discussed below (a separate set of review evaluations dealing with this matter has been provided to the Commission).

2. Furthermore, it is possible that some of the statutes provisionally proposed for repeal are still useful, and thus should not be repealed. Moreover, it is also possible that there are pieces of legislation not identified for repeal in this Discussion Paper which are of no practical utility anymore and which could be repealed. These should be identified and brought to the attention of the Commission.

## INDEX

### Chapter 1

#### **Project 25: Statutory Law Revision**

A.	Introduction	1
	(a) The objects of the South African Law Reform Commission	1
	(b) History of the investigation	1
B.	What is statutory law revision?	2
C.	The initial investigation	5
D.	Scope of the project	6
E.	Assistance by Government departments and stakeholders	8

### Chapter 2

#### **Repeal and Amendment of Legislation Administered by the Department of Rural Development and Land Reform**

A.	Introductory summary	9
B.	Statutes administered by the Department of Rural Development and Land Reform	14
C.	General observations	14
D.	Recommendations for the repeal and amendment of legislation currently administered by the Department of Rural Development and Land Reform	16
	1. Statutes repealed and provisionally proposed to be removed from the DRDLR list of legislation	17
	2. Amendment Acts that do not contain substantive provisions standing on their own, but only amend the principal legislation concerned	17
	3. Statutes provisionally proposed for repeal on the ground of unconstitutionality	18
	4. Statutes provisionally proposed for repeal on the ground of obsolescence	20
	5. Statutes provisionally proposed for amendment on the basis of its partly discriminatory nature and/or obsolescence	34

6.	Statutes provisionally proposed for retention without amendment	46
7.	Statutes provisionally proposed for referral for an interdepartmental review within the national sphere of government	66
8.	Statutes provisionally proposed for referral for an interdepartmental review within two or more spheres of government	76
9.	Statutes provisionally proposed for referral to the provincial sphere of government on account of such statute having been assigned to provincial premiers	80
10.	Examples of pre-1994 race-based legislation that has not been repealed (some of which have been assigned to provinces, and some of which are at the national level of government)	81
	<b>Annexure A</b>	
	<b>Rural Development and Land Reform General Laws Amendment and Repeal Bill</b>	<b>82</b>
	<b>Annexure B</b>	
	<b>Statutes administered by the Department of Rural Development and Land Reform (as provided by DRDLR)</b>	<b>88</b>
	<b>Annexure C</b>	
	<b>Categorisation of Acts</b>	<b>95</b>
	<b>Annexure D</b>	
	<b>Brief overview of issues relating to pre-1994 land legislation</b>	<b>103</b>
	<b>Annexure E</b>	
	<b>Abbreviations</b>	<b>118</b>

## DISCUSSION PAPER

### Chapter 1

#### Project 25: Statutory Law Revision

#### A INTRODUCTION

##### (a) The objects of the South African Law Reform Commission

1.1 The objects of the SA Law Reform Commission (the SALRC) are set out as follows in the South African Law Reform Commission Act 19 of 1973: to do research with reference to all branches of the law of the Republic and to study and to investigate all such branches of the law in order to make recommendations for the development, improvement, modernisation or reform thereof, including –

- the repeal of obsolete or unnecessary provisions;
- the removal of anomalies;
- the bringing about of uniformity in the law in force in the various parts of the Republic; and
- the consolidation or codification of any branch of the law.

1.2 In short, the SALRC is an advisory body whose aim is the renewal and improvement of the law of South Africa on a continuous basis.

##### (b) History of the investigation

1.3 Shortly after its establishment in 1973, the SALRC undertook a revision of all pre-Union legislation as part of its project 7 that dealt with the review of pre-Union legislation. This resulted in the repeal of approximately 1 200 ordinances and proclamations of the former Colonies and Republics. In 1981 the SALRC finalised a report on the repeal of post-Union statutes as part of its project 25 on statute law: the establishment of a permanently simplified, coherent and generally accessible statute book. This report resulted in Parliament adopting the Repeal of Laws Act, 1981 (Act No 94 of 1981) which repealed approximately 790 post-Union statutes.

1.4 In 2003 Cabinet approved that the Minister of Justice and Constitutional Development co-ordinates and mandates the SALRC to review provisions in the legislative framework that would result in discrimination as defined by section 9 of the Constitution. This section

prohibits unfair discrimination on the basis of race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language and birth.

1.5 In 2004 the SALRC included in its law reform programme an investigation into statutory law revision, which entails a revision of all statutes from 1910 to date. While the emphasis in the previous investigations was to identify obsolete and redundant provisions for repeal, the emphasis in the current investigation will be on compliance with the Constitution. However, all redundant and obsolete provisions identified in the course of the current investigation will also be recommended for repeal. Furthermore, it should be stated right from the outset that the constitutional inquiry is limited to statutory provisions that blatantly violate the provisions of section 9 (the equality clause) of the Constitution.

1.6 With the advent of constitutional democracy in 1994, the legislation enacted prior to that year remained in force. This has led to a situation where numerous pre-1994 provisions are constitutionally non-compliant. The matter is compounded by the fact that some of these provisions were enacted to promote and sustain the policy of apartheid. A recent provisional audit, by the SALRC, of national legislation remaining on the statute book since 1910, established that there are in the region of 2 800 individual statutes, comprising principal Acts, amendment Acts, private Acts, additional or supplementary Acts and partially repealed Acts. A substantial number of these Acts serve no useful purpose anymore, while many others still contain unconstitutional provisions that have already given rise to expensive and sometimes protracted litigation.

## **B. WHAT IS STATUTORY LAW REVISION?**

1.7 Statutory law revision ordinarily focuses on the identification and repeal of statutes that are no longer useful in practice. As the Law Reform Commission for England and Wales explains, the purpose of statute revision is to modernise and simplify statutes that need updating, and to reduce the size of the statute book to the benefit of legal professionals and other people who use it.<sup>1</sup> Revision lessens the chance of people being misled by redundant laws that still appear in the statute book and seem to be relevant or “live”. If statutory provisions appear in the statute book and are referred to in legal textbooks, readers may reasonably assume they still serve a purpose.

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<sup>1</sup> See the *Background Notes on Statute Law Repeals* compiled by the Law Commission for England and Wales, par 1 accessed from [http://lawcommission.justice.gov.uk/docs/background\\_notes.pdf](http://lawcommission.justice.gov.uk/docs/background_notes.pdf) on 28 May 2008.

1.8 As is the case in other jurisdictions (and will be evident in this review), once legislation is deemed no longer to apply, the question arises whether it should remain in the statute book or be repealed.<sup>2</sup> Usually such legislation no longer has any legal effect and is considered obsolete, redundant, or spent. A statutory provision may be identified for repeal because the grounds for which it was passed have lapsed or are presently remedied by another measure or provision.

1.9 In the context of this investigation, the statutory law revision primarily targets statutory provisions that are obviously at odds with the Constitution, particularly section 9.

1.10 The Law Commission for England and Wales lists the following guidelines for identifying statutory provisions that are candidates for repeal:<sup>3</sup>

- (a) references to bodies, organisations, etc. that have been dissolved or wound up or which have otherwise ceased to serve any purpose;
- (b) references to issues that are no longer relevant as a result of changes in social or economic conditions (e.g. legislation about tithes or tin mines);
- (c) references to Acts that have been superseded by more modern (or EU) legislation or by international Convention;
- (d) references to statutory provisions (i.e. sections, schedules, orders, etc.) that have been repealed;
- (e) repealing provisions e.g. "Section 33 is repealed/shall cease to have effect";
- (f) commencement provisions once the whole of an Act is in force;
- (g) transitional or savings provisions that are spent;
- (h) provisions that are self-evidently spent - e.g. a one-off statutory obligation to do something becomes spent once the required act has duly been done;
- (i) powers that have never been exercised over a period of many years or where any previous exercise is now spent.

1.11 The Law Commission of India notes that in England the terms "expired", "spent", "repealed in general terms", "virtually repealed", "superseded", and "obsolete" were defined in memoranda to Statute Law Revision Bills as follows:<sup>4</sup>

- Expired – that is, enactments which having been originally limited to endure only for a specified period by a distinct provision, have not

<sup>2</sup> See the *Background Notes on Statute Law Repeals* compiled by the Law Commission for England and Wales, par 6 accessed from [http://lawcommission.justice.gov.uk/docs/background\\_notes.pdf](http://lawcommission.justice.gov.uk/docs/background_notes.pdf) on 28 May 2008.

<sup>3</sup> See the *Background Notes on Statute Law Repeals* compiled by the Law Commission for England and Wales, par 7 accessed from [http://lawcommission.justice.gov.uk/docs/background\\_notes.pdf](http://lawcommission.justice.gov.uk/docs/background_notes.pdf) on 28 May 2008.

<sup>4</sup> Law Commission of India *Ninety-Sixth Report on Repeal of Certain Obsolete Central Acts* March 1984; p 3 of Chapter 2 (p 6 of 21) accessed from <http://lawcommissionofindia.nic.in/51-100/Report96.pdf> on 29 August 2007.

been either perpetuated or kept in force by continuance, or which have merely had as their object the continuance of previous temporary enactments for periods now gone by effluxion of time

- Spent – that is, enactments spent or exhausted in operation by the accomplishment of the purposes for which they were passed, either at the moment of their first taking effect or on the happening of some event or on the doing of some act authorised or required
- Repealed in general terms – that is, repealed by the operation of an enactment expressed only in general terms, as distinguished from an enactment specifying the Acts which it is to operate
- Virtually repealed – where an earlier enactment is inconsistent with, or is rendered nugatory by, a later one
- Superseded – where a later enactment effects the same purposes as an earlier one by repetition of its terms or otherwise
- Obsolete – where the state of things contemplated by the enactment has ceased to exist, or the enactment is of such a nature as to be no longer capable of being put in force, regard being had to the alteration of political or social circumstances.

1.12 Statutory provisions usually become redundant as time passes.<sup>5</sup> Generally, the redundancy of legislation is not signalled by a single occurrence; rather, legislation is often simply overtaken by social and economic changes. Inevitably some provisions fade away more quickly than others. Relatively short-lived provisions include commencement and transitional provisions and those that confer powers to be exercised during the period between the passing of legislation and its implementation (in some jurisdictions known as “pump-priming” provisions). Provisions that provide for delegated legislation-making powers might also become unnecessary over time, or a committee or board established by a statute might no longer be required.

1.13 Substantial revision of statutory law is possible in South Africa because of the general savings provisions of section 12(2) of the South African Interpretation Act. The South African Interpretation Act, 1957 (Act 33 of 1957) mirrors section 16(1) of the Interpretation Act of 1978 of England and Wales.<sup>6</sup> Section 12(2) of the South African Interpretation Act provides that where a law repeals any other law, then unless the contrary intention appears, the repeal shall not:

- (a) revive anything not in force or existing at the time at which the repeal takes effect; or

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<sup>5</sup> *Background Notes on Statute Law Repeals* compiled by the Law Commission for England and Wales, par 9 and 10 accessed from [http://lawcommission.justice.gov.uk/docs/background\\_notes.pdf](http://lawcommission.justice.gov.uk/docs/background_notes.pdf) on 28 May 2008.

<sup>6</sup> *Background Notes on Statute Law Repeals* compiled by the Law Commission for England and Wales, par 8 accessed from [http://lawcommission.justice.gov.uk/docs/background\\_notes.pdf](http://lawcommission.justice.gov.uk/docs/background_notes.pdf) on 28 May 2008.

- (b) affect the previous operation of any law so repealed or anything duly done or suffered under the law so repealed; or
- (c) affect any right, privilege, obligation or liability acquired, accrued or incurred under any law so repealed; or
- (d) affect any penalty, forfeiture or punishment incurred in respect of any offence committed against any law so repealed; or
- (e) affect any investigation, legal proceeding or remedy in respect of any such right, privilege, obligation, liability, forfeiture or punishment as is in this subsection mentioned,

and any such investigation, legal proceeding or remedy may be instituted, continued or enforced, and any such penalty, forfeiture or punishment may be imposed, as if the repealing law had not been passed.

1.14 The methodology adopted in this investigation is to review the statute book by Department – the SALRC identifies a Department, reviews the national legislation administered by that Department for constitutionality and redundancy, sets out the preliminary findings and proposals in a consultation paper and consults with that Department to verify the SALRC’s preliminary findings and proposals. The next step that the SALRC undertakes is the development of a discussion paper in respect of the legislation of each Department, and upon its approval by the SALRC, it is published for general information and comment. Finally, the SALRC develops a report in respect of each Department that reflects the comment on the discussion paper and contains a draft Bill proposing amending legislation.

### **C. THE INITIAL INVESTIGATION**

1.15 In the early 2000s the SALRC and the German Agency for Technical Cooperation commissioned the Centre for Applied Legal Studies (CALs) of the University of the Witwatersrand to conduct a study to determine the feasibility, scope and operational structure of revising the South African statute book for constitutionality, redundancy and obsolescence. CALs pursued four main avenues of research in their study conducted in 2001:<sup>7</sup>

First, a series of role-player interviews were conducted with representatives of all three tiers of government, Chapter 9 institutions, the legal profession, academia and civil society. These interviews revealed a high level of support for the project.

Second, an analysis of all Constitutional Court judgments until 2001 was undertaken. Schedules reflecting the nature and outcome of the cases, and the statutes impugned were compiled. The three most problematic categories of legislative

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<sup>7</sup> “Feasibility and Implementation Study on the Revision of the Statute Book” prepared by the Law & Transformation Programme of the Centre for Applied Legal Studies of the University of the Witwatersrand.

provision were identified, and an analysis made of the Constitutional Court's jurisdiction in relation to each category. The three categories were: reverse onus provisions; discriminatory provisions; and provisions that infringe the principle of the separation of powers. Guidelines summarising the Constitutional Court's jurisprudence were compiled in respect of each category.

Third, sixteen randomly selected national statutes were tested against these guidelines. The outcome of the test was then compared against a control audit that tested the same statutes against the entire Bill of Rights, excluding socio-economic rights. A comparison of the outcomes revealed that a targeted revision of the statute book, in accordance with the guidelines, produced surprisingly effective results.

Fourth, a survey of five countries (United Kingdom, Germany, Norway, Switzerland and France) was conducted. With the exception of France, all the countries have conducted or are conducting statutory revision exercises, although the motivation for and the outcomes of these exercises differ.

1.16 The SALRC finalised the following reports, proposing reform of discriminatory areas of the law or the repeal of specific discriminatory provisions –

- the Recognition of Customary Marriages (August 1998);
- the Review of the Marriage Act 25 of 1961 (May 2001);
- the Application of the Bill of Rights to Criminal Procedure, Criminal Law, the Law of Evidence and Sentencing (May 2001);
- Traditional Courts (January 2003);
- the Recognition of Muslim marriages (July 2003);
- the Repeal of the Black Administration Act 38 of 1927 (March 2004);
- Customary Law of Succession (March 2004); and
- Domestic Partnerships (in March 2006)

#### **D. SCOPE OF THE PROJECT**

1.17 This investigation focuses not only on obsolescence or redundancy of provisions but also on the question of the constitutionality of provisions in statutes. In 2004 Cabinet endorsed that the highest priority be given to reviewing provisions that would result in discrimination as defined in section 9 of the Constitution which prohibits unfair discrimination on the basis of race, gender, sex, pregnancy, marital status, ethnic and social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language and birth.

1.18 The constitutional validity aspect of this project focuses on statutes or provisions in statutes that are clearly inconsistent with the right to equality entrenched in section 9 of the Constitution. In practical terms this means that this leg of the investigation will be limited to those statutes or provisions in statutes that:

- differentiate between people or categories of people, and which are not rationally connected to a legitimate government purpose; or

- unfairly discriminate against people or categories of people on one or more grounds listed in section 9(3) of the Constitution; or
- unfairly discriminate on grounds which impair or have the potential to impair a person's fundamental human dignity as a human being.

1.19 Consequently, a law or a provision in a law which appears, on the face of it, to be neutral and non-discriminatory but which has or could have discriminatory effect or consequences will be left to the judicial process.

1.20 The SALRC decided that the project should proceed by scrutinising and revising national legislation which discriminates unfairly.<sup>8</sup> However, even the section 9 inquiry is fairly limited, dealing primarily with statutory provisions that are blatantly in conflict with section 9 of the Constitution. This is necessitated by, among other considerations, time and capacity. It is not foreseen that the SALRC and government departments will have capacity in the foreseeable future to revise all national statutes or the entire legislative framework to determine whether they contain unconstitutional provisions.

1.21 Transversally, the following needs to be noted:

- (a) In terms of the Interpretation Act 33 of 1957, all references to the masculine gender include the female gender (section 6);
- (b) In terms of the Interpretation Act 33 of 1957, all references to the State President are deemed to be references to the President (section 2);
- (c) In terms of the Constitution of the Republic of South Africa 200 of 1993, all references to 'administrator' are deemed to be reference to 'premier';
- (d) The names of a number of the government departments, and the references to their Ministers, have been changed. See in this regard President's Minute No. 690 of 6 July 2009.

1.22 In addition, the Commission is aware of recent developments affecting some of the Acts administered by the Department of Rural Development and Land Reform (DRDLR). Within this context, the Commission has taken note of the contents of, and the parliamentary procedure in respect of, the Land Use Management Bill, 2008 [B27-2008]. This Bill was withdrawn before April 2009, and according to information made available to the Commission, is currently being redrafted. As the scope of this project includes only existing national principal land reform and administration legislation that is currently being

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<sup>8</sup> Cathi Albertyn prepared a 'Summary of Equality Jurisprudence and Guidelines for Assessing the SA Statute Book for Constitutionality against section 9 of the 1996 Constitution', specifically for the SALRC in February 2006.

administered by the DRDLR, the potential implications of envisaged draft legislation on the body of existing law, have not been taken into account for purposes of this report. It follows that follow-up research will have to be done by the DRDLR if any new principal legislation is enacted in order to determine the effect on legislation that is currently in force.

1.23 As the latest version of every Principal Act was analysed for purposes of this Discussion Paper, separate evaluations of Amendment Acts were not necessary. The only exception to this is the analysis of the General Laws Second Amendment Act 108 of 1993 as it amended a range of other legislation.

#### **E. ASSISTANCE BY GOVERNMENT DEPARTMENTS AND STAKEHOLDERS**

1.24 In 2004, Cabinet endorsed the proposal that government departments should be requested to participate in and contribute to this investigation. In certain instances, legal researchers cannot decide whether to recommend a provision for repeal unless they have access to factual information that might be considered “inside” knowledge – of the type usually accessible within a specific department or organisation. Examples include savings or transitional provisions that are instituted to preserve the status quo until an office-holder ceases to hold office or until a loan has been repaid. In such cases, the consultation paper drafted by the SALRC invited the department or organisation being consulted to supply the necessary information. The aim of the publication of discussion papers in this investigation is likewise to determine whether departments and stakeholders agree with and support the proposed findings and legislative amendment or repeal proposals. Any assistance that can be given to fill in the gaps will be much appreciated. It is important that the departments concerned take ownership over this process. This will ensure that all relevant provisions are identified and dealt with responsively and without creating unintended negative consequences.

## Chapter 2

### Repeal and Amendment of Legislation Administered by the Department of Rural Development and Land Reform

#### A. Introductory summary

2.1 In this chapter, the statutes that have been repealed and are provisionally proposed to be entirely removed from DRDLR's list of legislation include the following:

- Black Administration Amendment Act, 1942 (Act No.42 of 1942);
- Black Administration Amendment Act, 1956 (Act No.42 of 1956);
- Black Laws Amendment Act, 1949 (Act No.56 of 1949);
- Black Laws Amendment Act, 1952 (Act No.54 of 1952);
- Black Laws Amendment Act, 1962 (Act No.46 of 1962);
- Black Laws Amendment Act, 1974 (Act No.70 of 1974);
- Black Laws Amendment Act, 1976 (Act No.4 of 1976);
- Community Development Amendment Act, 1967 (Act No.42 of 1967);
- Community Development Amendment Act, 1968 (Act No.58 of 1968);
- Community Development Amendment Act, 1970 (Act No.74 of 1970);
- Community Development Amendment Act, 1971 (Act No.68 of 1971);
- Community Development Amendment Act, 1972 (Act No.93 of 1972);
- Community Development Amendment Act, 1975 (Act No.19 of 1975);
- Community Development Amendment Act, 1977 (Act No.126 of 1977);
- Community Development Amendment Act, 1978 (Act No.19 of 1978);
- Community Development Amendment Act, 1980 (Act No.12 of 1980);
- Community Development Amendment Act, 1982 (Act No.26 of 1982);
- Community Development Amendment Act, 1983 (Act No.64 of 1983);
- Community Development Amendment Act, 1984 (Act No.20 of 1984);
- Community Development Amendment Act, 1986 (Act No.48 of 1986); and
- Land Survey Amendment Act, 1981 (Act No.26 of 1981).

2.2 As Amendment Acts amend principal legislation, and after enactment are incorporated into the body of the relevant principal legislation, the following Amendment Acts are not analysed as if they were stand alone statutes. These Amendment Acts' repeal or amendment follows from the proposed repeal or amendment of the Principal Acts concerned (see paragraph 2.5 below):

- Abolition of Racially Based Land Measures Amendment Act, 1991 (Act No.108 of 1991);
- Abolition of Racially Based Land Measures Amendment Act, 1992 (Act No.133 of 1992);
- Deeds Registries Amendment Act, 1953 (Act No.15 of 1953);
- Deeds Registries Amendment Act, 1957 (Act No.43 of 1957);
- Deeds Registries Amendment Act, 1962 (Act No.43 of 1962);
- Deeds Registries Amendment Act, 1965 (Act No.87 of 1965);
- Deeds Registries Amendment Act, 1969 (Act No.61 of 1969);
- Deeds Registries Amendment Act, 1972 (Act No.3 of 1972);
- Deeds Registries Amendment Act, 1977 (Act No.41 of 1977);
- Deeds Registries Amendment Act, 1978 (Act No.92 of 1978);
- Deeds Registries Amendment Act, 1980 (Act No.44 of 1980);
- Deeds Registries Amendment Act, 1982 (Act No.27 of 1982);
- Deeds Registries Amendment Act, 1984 (Act No.62 of 1984);
- Deeds Registries Amendment Act, 1987 (Act No.75 of 1987);
- Deeds Registries Amendment Act, 1989 (Act No.24 of 1989);
- Deeds Registries Amendment Act, 1993 (Act No.14 of 1993);
- Deeds Registries Amendment Act, 1996 (Act No.11 of 1996);
- Deeds Registries Amendment Act, 1998 (Act No.93 of 1998);
- Deeds Registries Amendment Act, 2003 (Act No.9 of 2003);
- KwaZulu-Natal Ingonyama Trust Amendment Act, 1997 (Act No.9 of 1997);
- Land Administration Amendment Act, 1996 (Act No.52 of 1996);
- Land Affairs General Amendment Act, 1995 (Act No.11 of 1995);
- Land Affairs General Amendment Act, 1998 (Act No.61 of 1998);
- Land Affairs General Amendment Act, 2000 (Act No.11 of 2000);
- Land Affairs General Amendment Act, 2001 (Act No.51 of 2001);
- Land Restitution and Reform Laws Amendment Act, 1996 (Act No.78 of 1996);
- Land Restitution and Reform Laws Amendment Act, 1997 (Act No.63 of 1997);
- Land Restitution and Reform Laws Amendment Act, 1999 (Act No.18 of 1999);
- Physical Planning Amendment Act, 1983 (Act No.87 of 1983);

- Physical Planning Amendment Act, 1984 ( Act No.104 of 1984);
  - Physical Planning Amendment Act, 1985 ( Act No.92 of 1985);
  - Professional Land Surveyors' and Technical Surveyors' Amendment Act, 1986 (Act No.37 of 1986);
  - Professional Land Surveyors' and Technical Surveyors' Amendment Act, 1987 (Act No.66 of 1987);
  - Professional Land Surveyors' and Technical Surveyors' Amendment Act, 1993 (Act No.34 of 1993);
  - Provision of Certain Land for Settlement Amendment Act, 1998 (Act No.26 of 1998);
  - Regional and Land Affairs General Amendment Act, 1993 (Act No.89 of 1993);
  - Regional and Land Affairs Second General Amendment Act, 1993 (Act No.170 of 1993);
  - Removal of Restrictions Amendment Act, 1977 (Act No.55 of 1977);
  - Removal of Restrictions Amendment Act, 1984 (Act No.18 of 1984);
  - Restitution of Land Rights Amendment Act, 1995 (Act No.84 of 1995);
  - Restitution of Land Rights Amendment Act, 2003 (Act No.54 of 2003);
  - Second Community Development Amendment Act, 1982 (Act No.68 of 1982);
  - Sectional Titles Amendment Act, 1991 (Act No.63 of 1991);
  - Sectional Titles Amendment Act, 1992 (Act No.7 of 1992);
  - Sectional Titles Amendment Act, 1993 (Act No.15 of 1993);
  - Sectional Titles Amendment Act, 1997 (Act No.44 of 1997);
  - Sectional Titles Amendment Act, 2003 (Act No.29 of 2003);
  - State Land Disposal Amendment Act, 1968 (Act No.28 of 1968);
  - State Land Disposal Amendment Act, 1976 (Act No.26 of 1976);
  - State Land Disposal Amendment Act, 1982 (Act No.66 of 1982);
  - State Land Disposal Amendment Act, 1987 (Act No.47 of 1987);
  - State Land Disposal Amendment Act, 1988 (Act No.19 of 1988);
  - Town and Regional Planners Amendment Act, 1987 (Act No.48 of 1987);
  - Town and Regional Planners Amendment Act, 1988 (Act No.20 of 1988);
  - Town and Regional Planners Amendment Act, 1990 (Act No.37 of 1990);
  - Town and Regional Planners Amendment Act, 1993 (Act No.28 of 1993);
  - Town and Regional Planners Amendment Act, 1995 (Act No.3 of 1995)
- [Note: The Principal Act, the Town and Regional Planners Act, 1984 (Act No. 19 of 1984) has been repealed]; and

- Upgrading of Land Tenure Rights Amendment Act, 1996 (Act No.34 of 1996).

2.3 The statutes provisionally proposed for repeal on the ground of unconstitutionality are the following:

- Communal Land Rights Act, 2004 (Act No.11 of 2004); and
- Extension of Security of Tenure Act, 1997 (Act No. 62 of 1997).

2.4 The statutes provisionally proposed for repeal on the ground of obsolescence include the following:

- Community Development Act, 1966 (Act No.3 of 1966);
- Development Facilitation Act, 1995 (Act No.67 of 1995) (proposed to be repealed and replaced by a comprehensive Land Use Management Act);
- General Law Second Amendment Act, 1993 (Act No. 108 of 1993) (certain sections);
- Land Survey Act, 1997 (Act No.8 of 1997) (certain sections);
- Physical Planning Act, 1991 ( Act No.125 of 1991);
- State Land Disposal Act, 1961 (Act No.48 of 1961) (certain sections) and
- Black Authorities Act, 1951 (Act No. 68 of 1951).

2.5 The statutes provisionally proposed for amendment on the basis of its partly discriminatory nature and/or obsolescence include the following:

- General Law Second Amendment Act, 1993 (Act No. 108 of 1993) (certain sections) (the relevant sections of the Principal Act also need to be amended);
- Interim Protection of Informal Land Rights Act, 1996 (Act No.31 of 1996);
- Physical Planning Act, 1967( Act No.88 of 1967); and
- State Land Disposal Act, 1961 (Act No.48 of 1961).

2.6 The statutes provisionally proposed for retention without amendment include the following:

- Abolition of Certain Titles and Conditions Act, 1999 (Act No.43 of 1999);
- Communal Property Association Act, 1996 (Act No.28 of 1996);
- Deeds Registries Act, 1937 (Act No.47 of 1937);
- Land Administration Act, 1995 (Act No.2 of 1995);
- Land Reform (Labour Tenants) Act, 1996 (Act No.3 of 1996);
- Land Titles Adjustment Act, 1993 (Act No.111 of 1993);
- Planning Profession Act, 2002 (Act No.36 of 2002);

- Professional and Technical Surveyors' Act, 1984 (Act No.40 of 1984);
- Provision of Land and Assistance Act, 1993 (Act No. 126 of 1993) (previous title: Provision of Certain Land for Settlement Act);
- Restitution of Land Rights Act, 1994 (Act No.22 of 1994);
- Sectional Titles Act, 1986 (Act No.95 of 1986);
- Spatial Data Infrastructure Act, 2003 (Act No.54 of 2003);
- Transformation of Certain Rural Areas Act, 1998 (Act No.94 of 1998);
- Upgrading of Land Tenure Rights Act, 1991 (Act No.112 of 1991); and
- KwaZulu-Natal Ingonyama Trust Act, 1994 (No.3KZ of 1994)

2.7 The statutes provisionally proposed for referral for an interdepartmental review within the national sphere of government include the following:

- Distribution and Transfer of Certain State Land Act, 1993 (Act 119 of 1993);
- General Law Second Amendment Act, 1993 (Act No. 108 of 1993);
- Kimberly Leasehold Conversion to Freehold Act, 1961 (Act No.40 of 1961);
- Land Administration Act, 1995 (Act No.2 of 1995);
- Land Affairs Act, 1987 (Act No.101 of 1987);
- Physical Planning Act, 1967( Act No.88 of 1967); and
- State Land Disposal Act, 1961 (Act No.48 of 1961).

2.8 The statutes provisionally proposed for referral for an interdepartmental review within two or more spheres of government include the following:

- KwaZulu Land Affairs Amendment Act, 1998 (Act No. 48 of 1998);
- Physical Planning Act, 1967( Act No.88 of 1967); and
- Removal of Restrictions Act, 1967 (Act No.84 of 1967).

2.9 The statute provisionally proposed for referral to the provincial sphere of government on account of such statute having been assigned to provincial premiers is the:

- KwaZulu Land Affairs Amendment Act, 1998 (Act No. 48 of 1998).

2.10 Examples of pre-1994 race-based legislation that has not been repealed (some of which have been assigned to the provinces, and some of which are at the national level of government) See Annexure D.

2.11 Towards the end of this chapter, an evaluation is included of a number of statutes provisionally proposed to be retained. The reasons for their inclusion in this Paper were alluded to above and are further attended to below. All of the above provisional proposals (paragraphs 2.1 – 2.10) have been summarised in table format in Annexure C to this Discussion Paper.

## **B. Statutes administered by the Department of Rural Development and Land Reform**

2.12 The Commission has identified for purposes of the current review 32 Principal Acts and 78 Amendment Acts as being statutes that are administered by the DRDLR (see the Annexures to this Discussion Paper). The Commission, after conducting an investigation to determine whether any of these Acts or provisions therein may be repealed as a result of redundancy, obsolescence or unconstitutionality in terms of section 9 of the Constitution, has identified a number of Acts that may be repealed fully or in part and some Acts that may be otherwise amended. These Acts are contained in Schedules 1 to 3 of the proposed Bill (see Annexure A).

## **C. General observations**

2.13 Bearing in mind the importance of land administration and land reform to the people of South Africa and the inevitable impact of the successful implementation thereof on people's rights generally, it is to be made clear that this Discussion Paper forms part of a narrowly focused and text-based statutory review process as is outlined above. Where a statute administered by the DRDLR seems to be free of any provisions that contradict or violate section 9 of the Constitution, it is accordingly not to say that the execution of such statute necessarily takes place in line with the protection afforded by the section 9 equality clause. Therefore, this Discussion Paper does not reflect on any consequential and/or operational effects of the execution of powers in terms of the legislation reviewed.

2.14 Several post-1996 statutes formed part of the review for purposes of this Discussion Paper. Some of these statutes were found to contain sections that are not fully compliant with section 9 of the Constitution (see paragraph 2.5 above).

2.15 However, although not part of the purpose of and core mandate for the current investigation, it has been observed in general that a significant number of provisions

contained in several pre-1996 and post-1996 land administration and land reform statutes require statutory revision in order to:

- Ensure that land administration and land reform legislation is aligned with the values and provisions of the Constitution, generally;
- Ensure that land administration and land reform legislation is aligned with other framework and sectoral legislation in South Africa, generally;
- Improve the statutory regulation of matters related to land administration and land reform in the context of cooperative government;
- Clarify the role and responsibilities of several land administration and land reform structures, including communal property associations, traditional councils and the role and responsibilities of the different spheres of government;
- Fortify legal certainty with regard to issues such as compulsory decision-making powers on the part of the MECs responsible for land-related matters and to whom various aspects pertaining to the implementation of land administration and land reform may have been delegated;
- Eliminate discrepancies in and overlap between different statutes regulating land administration and land reform; and
- More comprehensively regulate some land administration and land reform affairs that are currently ill-defined or ambiguous.

2.16 Although this Discussion Paper focuses on matters related to the constitutional equality clause alone, in light of the general observations above, it is strongly recommended that an extensive statutory review process be initiated in the context of the legislation administered by the DRDLR with a significantly wider scope than that of the current investigation. This review should, amongst others, include the following:

- (a) Determining the constitutionality of legislation administered by DRDLR with reference to all the other provisions of the Constitution (outside of section 9, which forms the basis of the review done for purposes of this report);
- (b) Updating the list of legislation administered by DRDLR by including all the pre-1994 subordinate legislation which formed the basis for land administration and reform in the former urban areas and homelands;
- (c) Updating the list of pre-1994 legislation within the functional domain of DRDLR and which has not been either allocated to DRDLR or listed in the DRDLR list of legislation (Annexure B);

- (d) Initiating a process to inventorise, analyse, review and rationalise the body of pre-1994 RSA, TBVC and self-governing territories' land administration legislation (both principal and subordinate) a part of which was assigned to provincial premiers by the President in terms of section 235(8) of the (interim) Constitution of the Republic of South Africa, 1993 (Act No.200 of 1993);
- (e) Advising the Department of Justice and Constitutional Development to submit draft legislation to Parliament with the view on amending all existing principal and subordinate legislation to explicitly refer to both the female and the male gender;
- (f) Advising the Department of Justice and Constitutional Development to submit draft legislation to Parliament with the view on amending all existing principal and subordinate legislation to refer to the minister concerned as the minister responsible for land administration and land reform; and
- (g) Initiating a process to survey the practical day-to-day application of the Acts mentioned in this Discussion Paper.

**D. Recommendations for the repeal and amendment of legislation currently administered by the Department of Rural Development and Land Reform**

2.17 For purposes of this report, the analysis of legislation administered by DRDLR has indicated the need to make a distinction between the following categories of legislation:

1. Legislation which requires an extensive transversal analysis process, involving either other government departments or DRDLR and one or more other government departments. A typical example of this category is the various Black Laws Amendment Acts (Annexure B, no. 4-8).
2. Legislation which has already been repealed, and which consequently should be removed from the DRDLR list, e.g. the Community Development Amendment Acts (Annexure B, no. 9-21).
3. Amendment Acts which are in principle included in the latest version of the principal legislation concerned. The analysis contained in this report thus focuses only on the review of the principal legislation (which encompasses all amendment legislation). Examples of this are the various Deeds Registries Amendment Acts (Annexure B, no. 22-38).

2.18 As there are no Repeal Acts listed by the DRDLR (see Annexure B), there is no need to discuss this matter in more detail.

2.19 Some related observations follow in the discussion below. All the relevant Acts were categorised in the following categories:

- Statutes repealed and provisionally proposed to be removed from the DRDLR list of legislation (paragraph 2.1 above)
- Amendment Acts that do not contain substantive provisions standing on their own, but only amend the principal legislation concerned (paragraph 2.2 above)
- Statutes provisionally proposed for repeal on the ground of unconstitutionality (paragraph 2.22 and 2.27 below)
- Statutes provisionally proposed for repeal on the ground of discrimination and/or obsolescence (paragraph 2.5 above)
- Statutes provisionally proposed for repeal on the ground of obsolescence (paragraph 2.4 above)
- Statutes provisionally proposed for amendment (paragraph 2.5 above)
- Statutes provisionally proposed for retention without amendment (paragraph 2.6 above)
- Statutes provisionally proposed for referral for an interdepartmental review within the national sphere of government (paragraph 2.7 above)
- Statutes provisionally proposed for referral for an interdepartmental review within two or more spheres of government (paragraph 2.8 above)
- Statutes provisionally proposed for referral to the provincial sphere of government on account of such statutes having been assigned to provincial premiers (paragraph 2.9 above)

**1. Statutes repealed and provisionally proposed to be removed from the DRDLR list of legislation**

2.20 As indicated above (paragraph 2.18), the list of Acts administered by the DRDLR (see Annexure B) does not contain any Repeal Acts.

**2. Amendment Acts that do not contain substantive provisions standing on their own, but only amend the principal legislation concerned**

2.21 There are no Amendment Acts that contain substantive provisions standing on their own. All the listed Amendment Acts only amend the principal legislation concerned.

### 3. Statutes provisionally proposed for repeal on the ground of unconstitutionality

#### (a) Communal Land Rights Act 11 of 2004

##### (i) Provisional proposal

2.22 It is provisionally proposed that the Communal Land Rights Act 11 of 2004 be repealed following the Constitutional Court judgement in the *Tongoane and Others v National Minister for Agriculture and Land Affairs and Others*.<sup>9</sup>

##### (ii) Evaluation of Communal Land Rights Act 11 of 2004

2.23 The Communal Land Rights Act 11 of 2004 has not yet commenced. It provides for legal security of tenure by transferring communal land, including KwaZulu-Natal Ingonyama Trust land, to communities, or by awarding comparable redress. The Act also provides for the conduct of a land rights enquiry to determine the transition from old order rights to new order rights, as well as for the democratic administration of communal land by communities. In addition, the Act was passed to establish Land Rights Boards, and to provide for the co-operative performance of municipal functions on communal land. The Act aims to amend or repeal certain laws, and to provide for matters incidental thereto.

2.24 The Act consists of 10 chapters. Chapter 1 contains the definitions, and deals with the application of the Act. Chapter 2 deals with the juristic personality of a community and security of tenure. Chapter 3 provides for the transfer and registration of communal land, and chapter 4 deals with the provision of comparable redress where tenure cannot be legally secured. Chapter 5 provides for the conduct of a land rights inquiry. Chapter 6 deals with the content, making and registration of community rules. Chapter 7 provides for the establishment of a Land Administration Committee and chapter 8 with the establishment of a Land Rights Board. Chapter 9 contains provisions relating to KwaZulu-Natal Ingonyama Trust land. Chapter 10 contains general provisions.

2.25 On 11 May 2010, the Constitutional Court declared that the Act is unconstitutional in its entirety for want of compliance with section 76 of the Constitution.<sup>10</sup> The Court held that

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<sup>9</sup> (CCT 100/09) [2010] ZACC 10 (11 May 2010)

<sup>10</sup> Ibid

“this judgement will, however, provide Parliament with the opportunity to take a second look at the substantive objections raised by the applicants in respect of CLARA when it considers the proper way to give effect to section 25(6) of the Constitution. Suffice it to say that the legislation contemplated by section 25(9) read with section 25(6) must be enacted with a sense of urgency and diligence”.<sup>11</sup>

2.26 Accordingly, it is recommended that the Communal Land Rights Act 11 of 2004 be repealed.

(b) Extension of Security of Tenure Act 62 of 1997

(i) Provisional proposal

2.27 It is provisionally proposed that the Extension of Security of Tenure Act 62 of 1997 be repealed. According to the comments received from the DRDLR on the Consultation Paper submitted to them in January 2010, the Department indicated that they are working on the draft ‘Land Tenure Security Bill’ which, if passed by Parliament, will repeal the Extension of Security of Tenure Act, 1997.<sup>12</sup>

(ii) Evaluation of Extension of Security of Tenure Act 62 of 1997

2.28 The Extension of Security of Tenure Act 62 of 1997 commenced on 28 November 1997. The Act provides for measures with State assistance to facilitate long-term security of land tenure. It aims to regulate the conditions of residence on certain land; to regulate the conditions on, and circumstances under, which the right of persons to reside on land may be terminated; to regulate the conditions and circumstances under which persons, whose right of residence has been terminated, may be evicted from land; and to provide for matters connected therewith.

2.29 The Act is administered by the DRDLR.

2.30 With regard to the extent of, and reason for, current applicability, this Act is of national application, but only in relation to agricultural land. Its main aim is to facilitate long-term security of tenure as well as to regulate the conditions of residence on certain land.

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<sup>11</sup> Ibid. paragraph 127

<sup>12</sup> Letter from Director: General: DRDLR to Professor Albertyn dated 31 March 2010

2.31 Some sections of this Act may possibly be unconstitutional. In relation to section 9 of the Constitution, section 6(2)(d) of this Act is discriminatory and unconstitutional. There is possible direct discrimination on the basis of gender/sex, as occupiers living in single sex accommodation are not entitled to the right of a family life, e.g. homosexual couples living in single sex hostels will not be able to adopt children. Discrimination on the basis of gender/sex needs to be “fair”, as well as justifiable in terms of section 36 of the Constitution in order for it to pass constitutional muster, as these grounds of discrimination are part of the so-called “listed” grounds. This means that a mere rational connection will not suffice. It may, however, be possible to justify the discrimination in this context if one takes into account the purpose and the rationale behind the discrimination in respect of the occupiers of single sex hostels. However, convincing arguments will have to be presented as case law illustrates the importance of equality in South Africa’s new constitutional dispensation.

2.32 Accordingly, It is provisionally proposed that the Extension of Security of Tenure Act 62 of 1997 be repealed.

#### **4. Statutes provisionally proposed for repeal on the ground of obsolescence**

##### **(a) Black Authorities Act 68 of 1951**

###### **(i) Provisional proposal**

2.33 It is provisionally proposed that the Black Authorities Act be repealed. The DRDLR has introduced the ‘Black Authorities Act Repeal Bill, 2009’ in the National Assembly which, if passed by Parliament, will repeal the Black Authorities Act 68 of 1951.<sup>13</sup>

###### **(ii) Evaluation of Black Authorities Act 68 of 1951**

2.34 The Black Authorities Act 68 of 1951 commenced on 17 July 1951. The Act was passed to establish certain Black authorities (namely tribal, regional and territorial authorities) (sections 2 and 3), and to define these authorities’ functions (sections 4 to 7). It provides for the management of the financial matters of these authorities (sections 8 to 11), for the establishment of territorial boards (section 7bis), as well as for the abolishment of

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<sup>13</sup> The Black Authorities Act Repeal Bill, 2009 was published with the Memorandum on its objects for general comment in Government Gazette No.32554 dated 11 September 2009.

certain councils upon the establishment of regional and territorial authorities (section 12), and for the requirements of legal proceedings by or against these authorities (section 13). The Black Authorities Act 68 of 1951 also has as its purposes the resolution of conflict between the different systems of Black administration (section 14), the abolishment of the Black Representative Council (section 18), and the amendment of the Black Affairs Act 23 of 1920 and the Representation of Blacks Act 12 of 1936. Lastly, the Act provides for Black conferences (section 15).

2.35 Major parts of the Black Authorities Act 68 of 1951 were assigned to various provincial premiers by the President in terms of section 235(8) of the interim Constitution of the Republic of South Africa 200 of 1993. Some non-assigned sections are apparently administered by the DCGTA.

2.36 The Act was assigned to the Province of the Eastern Cape to the extent of those matters falling within Schedule 6 (provincial functional domain) of the 1993 Constitution. Those issues outside Schedule 6 remain at national level. See in this regard Proclamation 111 of 1994 (Government Gazette 15813 of 17 June 1994). However, the Black Authorities Act 68 of 1951 was repealed by section 37(1) of the Eastern Cape Traditional Leadership and Governance Act 4 of 2005, which Act commenced on 1 April 2006.

2.37 Under Proclamation 111 of 1994 (Government Gazette No.1813 of 17 June 1994), the whole Act was also assigned to the Province of the North West, but later repealed by section 42(1) of North West Traditional Leadership and Governance Act 2 of 2005, which Act commenced on 20 March 2007.

2.38 Under Proclamation R166 of 1994 (Government Gazette 16049 of 31 October 1994), the administration of the whole of the Act was assigned to the Province of KwaZulu-Natal, with effect from 31 October 1994.

2.39 In addition, the Black Authorities Act 68 of 1951 was assigned to Mpumalanga (but was subsequently repealed by section 30(1) of the Mpumalanga Traditional Leadership and Governance Act 3 of 2005 (with effect from 7 April 2007)); to Limpopo Province (under Proclamation 109 of 1994 (Government Gazette No.15813 of 17 June 1994), with effect from 17 June 1994); and to the Province of the North West (under Proclamation 111 of 1994 (Government Gazette No.1813 of 17 June 1994), but later repealed by section 42(1) of North West Traditional Leadership and Governance Act 2 of 2005, which Act commenced on 20 March 2007).

2.40 The Act was not assigned to the Provinces of Gauteng, the Northern Cape, the Western Cape and the Free State.

2.41 According to the memorandum on the objects of the Black Authorities Act Repeal Bill, 2009, “the Act was a legislative cornerstone of apartheid by means of which Black people were controlled and dehumanized, and is reminiscent of past divisions and discrimination. It is both obsolete and repugnant to the values and human rights enshrined in the Constitution.”<sup>14</sup>

2.42 Accordingly, it is provisionally proposed that the Black Authorities Act be repealed.

(b) Community Development Act 3 of 1966

(i) Provisional proposal

2.43 It is provisionally proposed that the President promulgates by notice in the Government Gazette the commencement of:

- (a) section 14(1) of the Land Affairs Act 101 of 1987, which will result in the repeal of the Community Development Act 3 of 1966 (with the exception of section 51B of the Community Development Act 3 of 1966); and
- (b) section 14(2) of the Land Affairs Act 101 of 1987, which will result in the repeal of section 51B of the Community Development Act 3 of 1966 and the Community Development Amendment Act 48 of 1986.

(ii) Evaluation of Community Development Act 3 of 1966

2.44 The Community Development Act 3 of 1966 commenced on 17 February 1966 and has as some of its purposes the consolidation of the law relating to the development of certain areas; the promotion of community development in such areas; and the control of the disposal of affected properties. The Act provides for the granting of assistance to persons in order for them to acquire or hire immovable property; as well as for the establishment of a board for such purposes (sections 2 to 9 and sections 13 to 18) and the Community Development Fund (sections 11 and 12). The Act also provides for the termination of leases in certain areas (section 21). Reports on the activities of the board are required in terms of section 25. The Act provides for the extinction or modification of certain restrictions on land

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<sup>14</sup> Page 14 of Government Gazette No. 32554 dated 11 September 2010.

(section 26), and the waiving or modification of provisions of town-planning schemes or conditions of title of land (s 27). The Minister can, in terms of section 28, approve lay-out plans and the development of townships in anticipation of a proclamation.

2.45 Section 29 contains a list of affected properties, and section 37 provides for the removal of certain properties from this list. The Act provides for a pre-emptive right of the board in respect of affected properties (section 30); as well as for alterations, extensions or additions to buildings or new buildings on an affected property after the basic date (section 32). Section 33 deals with the determination of the basic value; and section 35 with the expropriation of an affected property by the State or any person other than the board. The Community Development Act 3 of 1966 provides for the prohibition on the disposal of affected property in certain circumstances (section 36), and for the acquisition of immovable property by the board by agreement or expropriation (section 38). Compensation in respect of the acquisition of property has to be determined in terms of section 41.

2.46 Section 14(1) of the Land Affairs Act 101 of 1987 repeals the whole of the Community Development Act 3 of 1966, except for section 51B. Section 14(2) repeals section 51B of the Community Development Act 3 of 1966 and the Community Development Amendment Act 48 of 1986. The date of commencement of section 14 still has to be proclaimed. The Community Development Act 3 of 1966 is thus currently still on the statute book.

2.47 Accordingly it is provisionally proposed that the President promulgates by notice in the Government Gazette the commencement of:

- (a) section 14(1) of the Land Affairs Act 101 of 1987, which will result in the repeal of the Community Development Act 3 of 1966 (with the exception of section 51B of the Community Development Act 3 of 1966); and
- (b) section 14(2) of the Land Affairs Act 101 of 1987, which will result in the repeal of section 51B of the Community Development Act 3 of 1966 and the Community Development Amendment Act 48 of 1986.

(c) Development Facilitation Act 67 of 1995

- (i) Provisional proposal

2.48 It is provisionally proposed that the Development Facilitation Act 67 of 1995 be repealed and replaced by a comprehensive Land Use Management Act.

(ii) Evaluation of Development Facilitation Act 67 of 1995

2.49 The Development Facilitation Act 67 of 1995 commenced on 22 December 1995. The purpose of the Act is to introduce extraordinary measures to facilitate and speed up the implementation of reconstruction and development programmes and projects in relation to land and in so doing to lay down general principles governing land development throughout the Republic; to provide for the establishment of a Development and Planning Commission for the purpose of advising the government on policy and laws concerning land development at national and provincial levels; to provide for the establishment in the provinces of development tribunals which have the power to make decisions and resolve conflicts in respect of land development projects; to facilitate the formulation and implementation of land development objectives by reference to which the performance of local government bodies in achieving such objectives may be measured; to provide for nationally uniform procedures for the subdivision and development of land in urban and rural areas so as to promote the speedy provision and development of land for residential, small-scale farming or other needs and uses; and to promote security of tenure while ensuring that end-user finance in the form of subsidies and loans becomes available as early as possible during the land development process.

2.50 The Act is administered by the DRDLR.

2.51 The Development Facilitation Act 67 of 1995 makes provision for general principles for land development and conflict resolution throughout the Republic. It establishes an advisory Development and Planning Commission. It provides for the establishment of development tribunals to make decisions and resolve conflicts in respect of land development projects. It sets out land development objectives which municipalities must apply. Two chapters contain development procedures in urban and rural contexts respectively. The Act introduces a new form of land tenure, namely initial ownership.

2.52 With regard to the extent of, and reason for, current applicability, it is important to note that the Act was passed as an interim measure. The Land Use Management Bill [B27-2008] provided for the repeal of the Development Facilitation Act 67 of 1995 in clause 77 read with Schedule 2.

2.53 The Memorandum on the Objects of the Land Use Management Bill, 2008, indicates that one of the negative aspects of the Act is that it did not repeal any of the pre-1994 pieces of planning legislation, many of which were discriminatory on the basis of race. The net

effect is that many pre-1994 planning laws remain in operation. In addition, the Act creates uncertainty in practice. The Land Use Management Bill [B27-2008] has, however, been withdrawn, and is currently being redrafted.

2.54 In the *City of Johannesburg Metropolitan Municipality v Gauteng Development Tribunal and Others*<sup>15</sup>, the main issue before the Constitutional Court was whether Chapters V and VI of the Development Facilitation Act 67 of 1995 are indeed unconstitutional by reason of being inconsistent with the constitutional scheme for the allocation of functions between the national, provincial and local spheres of government. The Development Facilitation Act was passed before the 1996 Constitution came into force.

2.55 The Court held that “the impugned chapters are inconsistent with section 156 of the Constitution read with Part B of Schedule 4.”<sup>16</sup>

2.56 Accordingly, it is provisionally proposed that the Act be repealed and replaced by a comprehensive Land Use Management Act.

(d) General Law Second Amendment Act 108 of 1993

(i) Provisional proposal

2.57 It is provisionally proposed that:

- (a) Certain sections of the General Law Second Amendment Act 108 of 1993 be repealed (sections 1 (Principal Act: Water Act 54 of 1956), 2 (Principal Act: Water Act 54 of 1956), 3 (Principal Act: Water Act 54 of 1956), 4 (Principal Act: Water Act 54 of 1956), 5 (Principal Act: Water Act 54 of 1956), 6 (Principal Act: Police Act 7 of 1958), 14 (Principal Act: Financial Relations Act 65 of 1976), 29 (Principal Act: Abolition of Racially Based Land Measures Act 108 of 1991) and 32 (Principal Act: Upgrading of Land Tenure Rights Act 112 of 1991)) (see discussion below);
- (b) Certain sections of the General Law Second Amendment Act 108 of 1993 be amended (sections 15(d) (Principal Act: Conversion of Certain Rights to Leasehold Act 81 of 1988), 16(h) (Principal Act: Conversion of Certain Rights to Leasehold Act 81 of 1988), 25(b) (Principal Act: Police Third Amendment

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<sup>15</sup> (CCT89/09) [2010] ZACC 11 (18 June 2010)

<sup>16</sup> Ibid. paragraph 70

Act 76 of 1989), 36(2) (Principal Act: South-West Africa Constitution Act 39 of 1968) and 37(1) (Short title and commencement)): (the relevant sections of the Principal Act also need to be amended) (see discussion below); and

- (c) The remaining sections of the Act be the subject of a thorough review undertaken by Departments of Human Settlement (DHS), Police, Environmental Affairs (DEA), and Agriculture, Forestry and Fisheries (DAFF).

- (ii) Evaluation of General Law Second Amendment Act 108 of 1993

2.58 The General Law Second Amendment Act 108 of 1993 commenced on 1 August 1993, but sections 13 and 14 were deemed to have come into operation on 30 June 1991 and sections 27 and 28 on 1 April 1992. The General Law Second Amendment Act 108 of 1993 amends 11 Acts and repeals a wide range of discriminatory and obsolete laws. It consists of 37 sections. Section 10 has been repealed by section 20 of the Housing Act 107 of 1997.

2.59 The purpose of the Act was to amend the following Acts:

- Water Act 54 of 1956;
- Police Act 7 of 1958;
- State Land Disposal Act 48 of 1961;
- Housing Act 4 of 1966;
- Removal of Restrictions Act 84 of 1967;
- General Law Amendment Act 101 of 1969;
- Financial Relations Act 65 of 1976;
- Conversion of Certain Rights to Leasehold Act 81 of 1988;
- Police Third Amendment Act 76 of 1989;
- Abolition of Racially Based Land Measures Act 108 of 1991; and
- Upgrading of Land Tenure Rights Act 112 of 1991.

2.60 In addition, the General Law Second Amendment Act also repealed a wide range of discriminatory and obsolete Acts.

2.61 The General Law Second Amendment Act 108 of 1993 is administered by a number of different departments (i.e. the DRDLR, the DHS, the Department of Police, the DEA and the DAFF). The Act should therefore be subject to a transversal analysis and the

Departments of Human Settlement, Police, Environmental Affairs, and Agriculture, Forestry and Fisheries should be consulted before any amendments are carried out.

2.62 With regard to the extent of, and reasons for current applicability, sections 7 and 8, 11 to 13, 15 to 28, 30 and 31, and 33 to 37 of the General Laws Second Amendment Act 108 of 1993 are still applicable. This is because they refer to statutes that are still in force.

2.63 The General Law Second Amendment Act does not appear to contain any blatantly discriminatory provisions, and appears to be consistent with section 9 of the Constitution. The Act does not, therefore, require amendment in this respect. It does, however, appear to contain a number of obsolete provisions. It is provisionally recommended that these provisions be repealed (sections 1, 2, 3, 4, 5, 6, 14 and 32).

2.64 In addition, the General Law Second Amendment Act also contains provisions or parts of provisions that appear to be spent. It is provisionally recommended that these provisions be repealed (section 29 and the phrase “or in respect of the administration of Walvis Bay” in section 36(2) and the phrase “and shall come into operation on a date fixed by the State President by proclamation in the Gazette” in section 37(1)).

2.65 Finally, some of the amendments effected by the General Law Second Amendment Act appear to be obsolete (sections 15(d), 16(h) and 25(b)). In so far as these amendments are concerned, it is provisionally recommended that the relevant sections of the Principal Act be amended.

2.66 Sections 1, 2, 3, 4, 5, 6, 14, and 32: It is provisionally recommended that these sections be repealed. This is because these sections amend statutes or parts of statutes that have been repealed and thus no longer have any practical effect. In other words, they are obsolete.

2.67 Sections 1, 2, 3, 4 and 5 amended various sections of the Water Act 54 of 1956. This Act was repealed by section 163(1) of the National Water Act 36 of 1998. Sections 1, 2, 3, 4 and 5 should therefore be repealed on the grounds that they amend an Act that no longer exists.

2.68 Section 6 amended one section of the Police Act 7 of 1958. The Police Act was repealed by section 12 of the Police Service Rationalisation Proclamation R5 of 1995.

Section 6 should therefore be repealed on the grounds that it amends an Act that no longer exists.

2.69 Section 14 amended one section of the Financial Relations Act 65 of 1976. The Financial Relations Act was repealed by section 230 of the Constitution of the Republic of South Africa, Act 200 of 1993. Section 14 should therefore be repealed on the grounds that it amends an Act that no longer exists.

2.70 Section 32 amended the Upgrading of Land Tenure Rights Act 112 of 1991 by inserting Chapter 2A. Chapter 2A of the Upgrading of Land Tenure Rights Act was repealed by section 6 of the Upgrading of Land Tenure Rights Amendment Act 34 of 1996. Section 32 should therefore be repealed on the grounds that it amends a part of the Upgrading of Land Tenure Rights Act that no longer exists.

2.71 Apart from the sections discussed above, it is provisionally recommended that section 29 also be repealed. This is because section 29 amends section 87(1) and (2) of the Abolition of Racially Based Land Measures Act 108 of 1991. In terms of section 87(4) of the Abolition of Racially Based Land Measures Act, however, the whole of section 87 lapsed on 31 December 1994. Section 87, including subsections (1) and (2), is thus spent. This means that section 29 is also spent and that it should, therefore, be repealed.

2.72 It is provisionally proposed that:

- (a) Certain sections of the General Law Second Amendment Act 108 of 1993 be repealed (sections 1 (Principal Act: Water Act 54 of 1956), 2 (Principal Act: Water Act 54 of 1956), 3 (Principal Act: Water Act 54 of 1956), 4 (Principal Act: Water Act 54 of 1956), 5 (Principal Act: Water Act 54 of 1956), 6 (Principal Act: Police Act 7 of 1958), 14 (Principal Act: Financial Relations Act 65 of 1976), 29 (Principal Act: Abolition of Racially Based Land Measures Act 108 of 1991) and 32 (Principal Act: Upgrading of Land Tenure Rights Act 112 of 1991)) (see discussion below);
- (b) Certain sections of the General Law Second Amendment Act 108 of 1993 be amended (sections 15(d) (Principal Act: Conversion of Certain Rights to Leasehold Act 81 of 1988), 16(h) (Principal Act: Conversion of Certain Rights to Leasehold Act 81 of 1988), 25(b) (Principal Act: Police Third Amendment Act 76 of 1989), 36(2) (Principal Act: South-West Africa Constitution Act 39 of 1968) and 37(1) (Short title and commencement)): (the relevant sections of the Principal Act also need to be amended) (see discussion below); and

- (c) The remaining sections of the Act be the subject of a thorough review undertaken by Departments of Human Settlement, Police, Environmental Affairs, and Agriculture, Forestry and Fisheries.

2.73 See in respect of other sections of the General Law Second Amendment Act 108 of 1993 also item 5 (Statutes provisionally proposed for amendment) and item 7 (Statutes provisionally proposed for referral for an interdepartmental review within the national sphere of government) below.

(e) Land Survey Act 8 of 1997

- (i) Provisional proposal

2.74 It is provisionally proposed that the transitional measures in sections 49 and 50 and Schedule II of the Land Survey Act 8 of 1997 be repealed on the ground of obsolescence.

- (ii) Evaluation of Land Survey Act 8 of 1997

2.75 The Land Survey Act 8 of 1997 commenced on 11 April 1997 and aims to regulate the survey of land in the Republic. Sections 2 to 3A and 5 to 6 provide for the appointment, powers, functions and duties of the Chief-Surveyor-General, the Surveyor-General and the Chief Director. Section 8 provides for fees of the office, and section 9 for the survey regulations board.

2.76 Provisions relating to land surveyors are set out in sections 11 and 12. Section 13 deals with the limitation of liability, and section 14 provides that no registration of land can take place without an approved diagram or general plan. Other provisions relating to diagrams and general plans are set out in sections 15 to 16 and 21 to 24. The Act deals with surveys and resurveys (sections 17 to 20 and 25 to 26). It also provides for the approval of a superseding general plan (section 27), the registration of a piece of land on a superseding general plan (section 28), and for the resolution of disputes (section 29 to 31). Sections 32 to 35 deal with boundaries. Sections 36 to 38 provide for the correction of registered diagrams and the alteration or cancellation of general plans, as well as diagrams for consolidated titles. Sections 39 to 42 deal with beacons and reference marks.

2.77 The Act also provides for the protection of trigonometrical stations (section 43); offences and compensation for damages sustained thereby (section 44); power of entry

upon land (section 45); as well as notices to the Surveyor-General of applications to court (section 46). The Act is binding on the State in terms of the provisions of section 47.

2.78 Sections 48 and 49 deal with the amendment of the Professional and Technical Surveyors' Act 40 of 1984, the repeal of laws of former entities and transitional provisions.

2.79 The transitional measures in sections 49 and 50 and Schedule II of the Act are obsolete.

2.80 The provisions of the Act may be summarised as follows: Firstly, there are provisions creating infrastructure for the supervision, control and carrying out of necessary surveys, the compilation of maps, the preservation of records and information relating to surveys of land and, in general, the administration of the Land Survey Act. Secondly, the Act regulates the procedure and requirements for undertaking surveys; the different types of surveys; compiling the necessary documents; settling disputes arising in respect of surveys; and approving diagrams or general plans compiled as a result of surveys. Thirdly, the Act provides for the organisation and control of the land surveyors profession. In this respect it must be read with the Professional Technical Surveyors Act 40 of 1984. In short, the Act regulates all matters related to the surveying of land.

2.81 The Act has some relevance in relation to conveyancing. The diagram, which is provided for in the Land Survey Act, is a crucial element in the South African system and process of land registration.

2.82 The Land Survey Act finds special application in relation to the development of Sectional Title Schemes. The boundaries of a section are identified with reference to physical data, namely walls, ceilings and floors of a particular building as shown on the sectional plan and not with reference to survey beacons as in the case of conventional erven. However, the Surveyor General will still have a final say in whether general surveying standards have been met before the Sectional Title Scheme is registered (See section 5 and regulation 5, Sectional Titles Act 95 of 1986).

2.83 The Land Survey Act was promulgated after the introduction of the final Constitution of 1996. In this sense, there should not be obvious discord between the provisions of this Land Survey Act and the Constitution, as there might be in cases of pre-constitutional legislation. In particular, the Land Survey Act indeed adheres to the values espoused in the Constitution Bill of Rights, especially section 9.

2.84 An overview of relevant judicial consideration of the Land Survey Act demonstrated that section 37(2) of the Act features prominently in case law. This section deals with the amendment of the general plan of a public space that is converted into private ownership, usually for the purposes of subdivision by a developer.

2.85 It is provisionally proposed that the transitional measures in sections 49 and 50 and Schedule II of the Act be repealed on the ground of obsolescence since they deal with transitional measures.

(f) Physical Planning Act 125 of 1991

(i) Provisional proposal

2.86 It is provisionally proposed that the Physical Planning Act 125 of 1991 be repealed on account of obsolescence.

(ii) Evaluation of Physical Planning Act 125 of 1991

2.87 The Physical Planning Act 125 of 1991 commenced on 30 September 1991 (subject to the repeal provisions of section 36). The purpose of the Act is to promote the orderly physical development of the Republic, and for that purpose to provide for the division of the Republic into regions, for the preparation of national development plans, regional development plans, regional structure plans and urban structure plans by the various authorities responsible for physical planning. The Act sets out the procedures, as well as the legal consequences of regional structure plans and urban structure plans. It envisages the repeal of the Physical Planning Act 88 of 1967 almost in its entirety.

2.88 In terms of section 35 the former self-governing territories are excluded from the application of the Act (i.e. areas for which legislative assemblies have been established under the Self-governing Territories Constitution Act 21 of 1971). This is redundant because, since the Act was adopted in 1991 the national territory of the Republic came to comprise the whole country, including the homelands (s 1 (2) of the Constitution of the Republic of South Africa, 1993.) In view of the proposed repeal of the Act it is immaterial. Detailed transition provisions with regard to the repeals are set out, not all of them in operation.

2.89 The Act is administered by the DRDLR.

2.90 With regard to the extent of, and reason for, current applicability, the provisions of the Physical Planning Act 125 of 1991 were never really implemented. It is mostly obsolete. The provisions of the Act have been surpassed by subsequent legislation, viz. the Local Government: Municipal Systems Act 32 of 2000 which, in chapter 5, provides for Integrated Development Planning. Not only the new local government dispensation, but also the Integrated Development Plans of municipalities supersede the plans provided for in the Physical Planning Act 125 of 1991. In the Land Use Management Bill [B32-2008] it was stated that many of the pre-1994 pieces of legislation on planning remain in operation. This regulatory framework fails to address the segregated and unequal spatial patterns inherited from apartheid. The Bill (clause 77 read with schedule 2) listed the Physical Planning Act 125 of 1991 to be one of the Acts to be repealed. The Land Use Management Bill [B27-2008] has, however, been withdrawn, and is currently being redrafted.

2.91 The Physical Planning Act 125 of 1991 is obsolete mainly because later planning legislation in a new government context has become applicable and it is recommended that it be repealed. Provision has been made for its repeal in the Land Use Management Bill [B27-2008] (clause 77 read with schedule 2), which Bill has been withdrawn and is currently being redrafted. (See also the Explanatory Summary of Land Use Management Bill, 2008 (Government Notice No.472 of 2008 in Government Gazette 30973 dated 15 April 2008) and the Memorandum on the Objects of the Land Use Management Bill, 2008.)

2.92 It is provisionally proposed that the Act be repealed on account of obsolescence.

(g) State Land Disposal Act 48 of 1961

(i) Provisional proposal

2.93 It is provisionally recommended that:

- (a) Certain sections of the State Land Disposal Act 48 of 1961 be repealed on the ground of obsolescence;
- (b) Certain sections of the State Land Disposal Act 48 of 1961 be amended on the basis of its partly obsolete nature; and
- (c) Certain sections of the State Land Disposal Act 48 of 1961 be referred for an interdepartmental review within the national sphere of government.

(ii) Evaluation of the State Land Disposal Act 48 of 1961

2.94 The State Land Disposal Act 48 of 1961 commenced on 28 June 1961 and provides for the disposal of certain State land and for matters incidental thereto; and for the prohibition on the acquisition of State land by prescription (section 3). Section 2 provides for the disposal of certain State land by the President, and section 2A for powers of the President in relation to certain rights of the State in respect of private land. In addition, the Act also provides that the President may consent to the amendment or cancellation of any condition registered against any land conferring a right in that land on the State.

2.95 The State Land Disposal Act 48 of 1961 is administered by both the DRDLR and the Department of Public Works (DPW) and it confers powers on both the Minister for Rural Development and Land Reform and the Minister for Public Works. It should, therefore, be subject to a transversal review process and the DPW should be consulted before any amendments are carried out.

2.96 The Act consists of 14 sections. Two of these sections have been repealed. The Act has also been amended on five occasions. The Act is important for a number of reasons:

- Firstly, the Act allows the disposal of national state land to take place on a centralised basis;
- Secondly, in practice, the disposal of national state land takes place primarily in terms of this Act;
- Thirdly, the Act confers on the President the power to amend or cancel any condition registered against any land conferring any right on the State; and
- Fourthly, the Act prohibits the acquisition of both national state land and provincial state land by means of acquisitive prescription.

2.97 The Act does, however, contain a number of obsolete and possible spent provisions. In addition, it does not accurately reflect the current system of national and provincial government, or the distinction that may be drawn between national state land and provincial state land.

2.98 With regard to the extent of, and reason for, current applicability, the State Land Disposal Act 48 of 1961 applies to the disposal of all types of national state land situated either within or outside of the Republic. It is currently applicable for the reasons set out above.

2.99 The Act fulfils an important function. For the purposes of this review, it does not contain any discriminatory provisions. It thus appears to be consistent with section 9 of the Constitution. The Act does not, therefore, require amendment in this respect. There are, however, a number of provisions which are obsolete or spent and it is provisionally proposed that these be amended.

2.100 Section 2B: It is provisionally recommended that section 2B be repealed. The reason for this is that the land referred to in section 2B(1) vested in the State on 1 April 1979; it is highly probable that over the past 30 years the national government may have disposed of all such land. If this is the case section 2B no longer serves any purpose and it may, therefore, be repealed.

2.101 It is provisionally recommended, therefore, that section 2B be repealed.

2.102 The Act does, however, not contain any discriminatory provisions.

2.103 It is provisionally recommended that:

- (a) Certain sections of the State Land Disposal Act 48 of 1961 be repealed on the ground of obsolescence;
- (b) Certain sections of the State Land Disposal Act 48 of 1961 be amended on the basis of its partly obsolete nature; and
- (c) Certain sections of the State Land Disposal Act 48 of 1961 be referred for an interdepartmental review within the national sphere of government.

2.104 See also item 5 (Statutes provisionally proposed for amendment on the basis of its partly discriminatory nature and/or obsolescence) and item 7 (Statutes provisionally proposed for referral for an interdepartmental review within the national sphere of government).

## **5. Statutes provisionally proposed for amendment on the basis of its partly discriminatory nature and/or obsolescence**

(b) General Law Second Amendment Act 108 of 1993

- (i) Provisional proposal

2.105 It is provisionally proposed that:

- (a) Certain sections of the General Law Second Amendment Act 108 of 1993 be repealed (sections 1 (Principal Act: Water Act 54 of 1956), 2 (Principal Act: Water Act 54 of 1956), 3 (Principal Act: Water Act 54 of 1956), 4 (Principal Act: Water Act 54 of 1956), 5 (Principal Act: Water Act 54 of 1956), 6 (Principal Act: Police Act 7 of 1958), 14 (Principal Act: Financial Relations Act 65 of 1976), 29 (Principal Act: Abolition of Racially Based Land Measures Act 108 of 1991) and 32 (Principal Act: Upgrading of Land Tenure Rights Act 112 of 1991)) (see discussion below);
  - (b) Certain sections of the General Law Second Amendment Act 108 of 1993 be amended (sections 15(d) (Principal Act: Conversion of Certain Rights to Leasehold Act 81 of 1988), 16(h) (Principal Act: Conversion of Certain Rights to Leasehold Act 81 of 1988), 25(b) (Principal Act: Police Third Amendment Act 76 of 1989), 36(2) (Principal Act: South-West Africa Constitution Act 39 of 1968) and 37(1) (Short title and commencement)): (the relevant sections of the Principal Act also need to be amended) (see discussion below); and
  - (c) The remaining sections of the Act be the subject of a thorough review undertaken by Departments of Human Settlement, Police, Environmental Affairs, and Agriculture, Forestry and Fisheries.
- (ii) Evaluation of General Law Second Amendment Act 108 of 1993

2.106 For an evaluation of the General Law Second Amendment Act 108 of 1993, see item 4 (Statutes provisionally proposed for repeal on the ground of obsolescence) above.

2.107 Sections 36(2) and 37(1): It is provisionally recommended that these sections be amended. The territory and sovereignty over Walvis Bay was transferred from South Africa to Namibia on 1 March 1994 in terms of section 2 of the Transfer of Walvis Bay to Namibia Act 203 of 1993. Accordingly, the phrase “or in respect of the administration of Walvis Bay” is spent and it should, therefore, be deleted from section 36(2).

2.108 The Act was brought in operation by the President on 1 August 1993 (see Government Notice R66 in Government Gazette 15027 dated 1 August 1993). Accordingly, the phrase “and shall come into operation on a date fixed by the State President by proclamation in the Gazette” is spent and it should, therefore, be deleted from section 37(1).

2.109 The General Law Second Amendment Act 108 of 1993 is administered by a number of different departments (i.e. the DRDLR, the DHS, the Department of Police, the DEA and

the DAFF). The Act should therefore be subject to a transversal analysis and the Departments of Human Settlement, Police, Environmental Affairs, and Agriculture, Forestry and Fisheries should be consulted before any amendments are carried out.

2.110 See also item 4 (Statutes provisionally proposed for repeal on the ground of obsolescence) above and item 7 (Statutes provisionally proposed for referral for an interdepartmental review within the national sphere of government) hereunder.

2.111 It is provisionally proposed that:

- (a) Certain sections of the General Law Second Amendment Act 108 of 1993 be repealed (sections 1 (Principal Act: Water Act 54 of 1956), 2 (Principal Act: Water Act 54 of 1956), 3 (Principal Act: Water Act 54 of 1956), 4 (Principal Act: Water Act 54 of 1956), 5 (Principal Act: Water Act 54 of 1956), 6 (Principal Act: Police Act 7 of 1958), 14 (Principal Act: Financial Relations Act 65 of 1976), 29 (Principal Act: Abolition of Racially Based Land Measures Act 108 of 1991) and 32 (Principal Act: Upgrading of Land Tenure Rights Act 112 of 1991)) (see discussion below);
- (b) Certain sections of the General Law Second Amendment Act 108 of 1993 be amended (sections 15(d) (Principal Act: Conversion of Certain Rights to Leasehold Act 81 of 1988), 16(h) (Principal Act: Conversion of Certain Rights to Leasehold Act 81 of 1988), 25(b) (Principal Act: Police Third Amendment Act 76 of 1989), 36(2) (Principal Act: South-West Africa Constitution Act 39 of 1968) and 37(1) (Short title and commencement)): (the relevant sections of the Principal Act also need to be amended) (see discussion below); and
- (c) The remaining sections of the Act be the subject of a thorough review undertaken by Departments of Human Settlement, Police, Environmental Affairs, and Agriculture, Forestry and Fisheries.

(c) Interim Protection of Informal Land Rights Act 31 of 1996

- (i) Provisional proposal

2.112 It is provisionally proposed that the Interim Protection of Informal Land Rights Act 31 of 1996 be retained and amended as stated in Annexure A below. The retention of the Act

has been underscored by the unconstitutionality finding of CLARA in the Tongoane judgement.<sup>17</sup>

(ii) Evaluation of Interim Protection of Informal Land Rights Act 31 of 1996

2.113 The Interim Protection of Informal Land Rights Act 31 of 1996 commenced on 26 June 1996. The Act provides for the temporary protection of certain rights to, and interests in, land which are not otherwise adequately protected by law; and provides for matters connected therewith.

2.114 The Act is administered by the DRDLR.

2.115 With regard to the extent of, and reasons for current applicability, the Act has national application and exists to provide protection for weaker titles in land.

2.116 The Act is a necessary legislative tool aimed at the protection of weaker rights in land. The offending provision should be rectified so as to prevent its possibly discriminatory effects.

2.117 In relation to section 9 of the Constitution, section 2(2) of this Act (Deprivation of informal rights to land) permits deprivation of land or a right in land where the land is held on a communal basis, and the decision to deprive is in accordance with the custom and usage of that community, subject to requirements set in subsection (4). The section is discriminatory. The section allows for deprivation of land or a right in land in terms of customary practice. This is possibly unconstitutional due to inherent inequalities found in traditional customary practices in some communities and could allow for indirect gender discrimination. The section also permits a deprivation which could be contrary to section 26(3) of the Constitution (the right not to be evicted from a home without a court order).

2.118 It is provisionally proposed that section 2(2) of the Act be amended as follows:

2. Deprivation of informal rights to land.

(2) Where land is held on a communal basis, a person may, subject to subsection (4), be deprived of such land or right in land in accordance with the custom and usage of that community, if the custom or usage concerned is in accordance with the law.

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<sup>17</sup> 4 ibid

2.119 This part of the Act fulfills an important role. It is provisionally proposed that the Act be retained and amended as indicated in Annexure A. The possible discriminatory effect(s) should be curtailed.

2.120 However, the exact impact of the Tongoane judgement<sup>18</sup> on the Interim Protection of Informal Land Rights Act, 1996 needs to be further scrutinized.

(d) Physical Planning Act 88 of 1967

(i) Provisional proposal

2.121 It is provisionally proposed that the Physical Planning Act 88 of 1967 be amended in consultation with the DEA as well as the provincial government departments responsible for urban and rural development. To the extent that this may also affect the functional domain of municipal planning, local government should also be consulted. It is proposed that section 13 be repealed.

(ii) Evaluation of Physical Planning Act 88 of 1967

2.122 The Physical Planning Act 88 of 1967 commenced on 7 July 1967 and aims to promote co-ordinated environment planning and the utilisation of the Republic's resources. For these purposes the Act provides for control of the zoning and subdivision of land for industrial purposes; the reservation of land for use for specific purposes; the establishment of controlled areas (section 5); as well as for restrictions upon the subdivision and use of land in these controlled areas (section 6). The province may issue permits authorising the use of land for a purpose other than the purpose for which the land was lawfully being used or authorise the use for land for brick making, sand washing, stone crushing or a quarry for the processing of any mineral. The Act also provides for the compilation and approval of guide plans; and for restrictions upon the use of land for certain purposes (unless reserved for use for such purposes). Section 13 provides for the exclusion of communal areas, viz. areas of land referred to in section 21(1) of the Development Trust and Land Act 18 of 1936 or in a scheduled 'Black' area as defined in that Act.

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<sup>18</sup>

4 ibid

2.123 The Act is administered by the Minister or Premier to whom the administration of any provision has been assigned by Proclamation issued under section 13B.

2.124 The Act is pre-1994 legislation, assigned to the Provinces in terms of Proclamation R47 of 1996 (in Government Gazette No.17375 of 23 August 1996). The following sections have been assigned to provincial premiers: Section 8, as well as sections 9, 9A and 12 in so far as they are necessary for the administration of section 8, and in so far as the said sections have not been repealed by section 36 of the Physical Planning Act 125 of 1991.

2.125 This Act is still applicable only in respect of guide plans, controlled areas, restrictions on the use of land in those areas, permits, and exemptions. Many of its provisions regarding guide plans have been superseded by the provisions in the Local Government: Municipal Systems Act 32 of 2002 (Chapter 5 - dealing with Integrated Development Planning). The Land Use Management Bill B27-2008 provided in clause 77 that the Act is to be repealed. (See also the Explanatory Summary of Land Use Management Bill, 2008, Government Gazette 30973 dated 15 April 2008.) The Land Use Management Bill [B27-2008] has, however, been withdrawn, and is currently being redrafted.

2.126 With regard to section 9 of the Constitution, section 13 of this Act (Exclusion of Black Areas) is probably discriminatory and unconstitutional. Section 9A may be in conflict with section 14 of the Constitution (the right to privacy) as a designated officer may enter without a warrant and conduct searches, etc. Section 13, which excludes the “former Black areas” from the application of the Act, is discriminatory and should be repealed.

2.127 It is provisionally proposed that the Act be amended in consultation with the DWEA as well as the provincial government departments responsible for urban and rural development (on account of a number of sections having been assigned to provincial premiers, and the fact that urban and rural development is a functional area of concurrent national and provincial legislative competence). To the extent that this may also affect the functional domain of municipal planning, local government should also be consulted. It is proposed that section 13 be repealed.

(e) State Land Disposal Act 48 of 1961

(i) Provisional proposal

2.128 It is provisionally recommended that:

- (a) Certain sections of the Act be repealed on the basis of its obsolete nature;
  - (b) Certain sections of the Act be amended on the basis of its partly obsolete nature; and
  - (c) Certain sections of the Act be referred for an interdepartmental review within the national sphere of government.
- (ii) Evaluation of the State Land Disposal Act 48 of 1961

2.129 For an evaluation of the State Land Disposal Act 48 of 1961, see 4 (Statutes provisionally proposed for repeal on the ground of obsolescence).

2.130 The Act does, however, contain a number of obsolete and possible spent provisions. In addition, it does not accurately reflect the current system of national and provincial government, or the distinction that may be drawn between national state land and provincial state land.

2.131 The Act fulfils an important function. For the purposes of this review, it does not contain any discriminatory provisions. It thus appears to be consistent with section 9 of the Constitution. The Act does not, therefore, require amendment in this respect. There are, however, a number of provisions which are obsolete or spent and it is provisionally proposed that these be amended.

- Section 1: It is provisionally recommended that the definition of the term "State land" in section 1 be amended. The definition of the term "State land" is obsolete. This is because it does not accurately reflect South Africa's new system of national and provincial government and, in particular, it does not accurately reflect the distinction that may now be drawn between "national state land" and "provincial state land". In this respect the following points may be made:
  - (a) First, that in terms of the new constitutional dispensation, ownership of state land does not vest only in the national government. Ownership of state land may vest in either the national or the provincial governments. A distinction may, therefore, be drawn between national state land and provincial state land. Ownership of national state land vests in the national government and ownership of provincial state land vests in the relevant provincial government. Support for this proposition may be found in section 239 of the interim Constitution. This section regulated the manner which state land that existed on the 27 April 1994 was allocated to either the national or the provincial

governments. It essentially provided in this respect that state land associated with the administration of a particular law would vest in the authority that had been assigned administrative responsibility for that law in terms of section 235 of the interim Constitution. The 1996 Constitution does not contain an equivalent provision. Item 28(1) of Schedule 6 of the 1996 Constitution does, however, provide that “on the production of a certificate by a competent authority that immovable property owned by the state is vested in a particular government in terms of section 239 of the previous Constitution, a registrar of deeds must make such entries or endorsements in or on any relevant register, title deed or other document to register that immovable property in the name of that government”.

- (b) Second, that the disposal of provincial state land is comprehensively regulated by provincial legislation. Over the past 15 years each of the provincial legislatures has enacted a “land administration” statute. These statutes confer the authority to dispose of provincial state land on the Premier or the relevant Member of the Executive Council. In each of these Acts, the right to dispose of provincial state land encompasses the right to sell, exchange, let, donate and encumber provincial state land. The relevant provincial Acts are as follows: the Eastern Cape Land Disposal Act 7 of 2000, Free State Land Administration Act 1 of 1998, Gauteng Land Administration Act 11 of 1996, KwaZulu-Natal Land Administration Act 3 of 2003; Northern Province Land Administration Act 6 of 1999, Mpumalanga Land Administration Act 5 of 1998, Northern Cape Land Administration Act 6 of 2002; North West Land Administration Act 4 of 2001; and Western Cape Land Administration Act 6 of 1998. In addition, some of these Acts also prohibit the acquisition of provincial state land by means of acquisitive prescription (see s 21 of the Gauteng Land Administration Act, s 12 of the KwaZulu-Natal Land Administration Act, s 8 of the Northern Cape Land Administration Act, s 7 of the North West Land Administration Act, and s 7 Western Cape Land Administration Act).
- (c) Third, that in accordance with the system of co-operative government, Parliament has enacted framework legislation aimed at regulating the manner in which the provincial governments may dispose of provincial state land. The Government Immovable Asset Management Act 19 of 2007 provides in this respect that relevant national and provincial departments of state must prepare custodian immovable asset plans (see section 4) and that these plans

must, *inter alia*, include a strategy for disposing of immovable assets (see section 7).

2.132 It is, therefore, provisionally proposed that the definition of state land be amended to reflect more accurately the distinction that may be drawn between national state land and provincial state land. Given, however, that such a change will have consequential effects on other provisions of the Act, for example section 3 which prohibits the acquisition of state land by means of acquisitive prescription, it is strongly recommended that the DRDLR and the DPW be consulted before any such amendment is made.

2.133 Apart from the fact that it does not accurately reflect the distinction that may be drawn between national state land and provincial state land, the definition of the term "State land" may also have to be amended because the references to section 3(4) of the Agricultural Holdings (Transvaal) Registration Act 22 of 1919 and sections 78(3) and (4) of the Town Planning and Townships Ordinance (Transvaal) 25 of 1965 may be obsolete.

2.134 Section 3(4) of the Agricultural Holdings (Transvaal) Registration Act 22 of 1919 refers to land which has been set aside for educational or other public purposes and which has been transferred to the President in return for being granted a certificate by the Minister exempting the area in which the land is located, and which has been divided into lots for the purpose of creating agricultural holdings, from certain provisions of the Town Planning and Townships Ordinance 11 of 1931.

2.135 It is unlikely that any such land has been transferred to the President since 1957. This is on account of the fact that the Agricultural Holdings (Transvaal) Registration Act 22 of 1919 was repealed in 1957 except in so far as it related to land which had already been divided into agricultural holdings and in respect of which a certificate had already been issued. The Agricultural Holdings (Transvaal) Registration Act 22 of 1919 was repealed by the Transvaal Provincial Council when it enacted section 36 of the Division of Land Ordinance (Transvaal) 20 of 1957 (the power to repeal the Agricultural Holdings (Transvaal) Registration Act 22 of 1919 was conferred on the Transvaal Provincial Council by section 4 of the Provincial Powers Extension Act 10 of 1944).

2.136 Given that it is unlikely that any such land has been transferred to the President since 1957, it is possible that the national government may have disposed of all such land. If this is the case then the purpose for which the reference to section 3(4) of the Agricultural Holdings (Transvaal) Registration Act 22 of 1919 was included in the definition of "State land" has

been fulfilled. The reference to section 3(4) of the Agricultural Holdings (Transvaal) Registration Act 22 of 1919 may, therefore, be repealed.

2.137 A somewhat similar argument may also be made in respect of the reference to section 78(3) and (4) of the Town Planning and Townships Ordinance 25 of 1965. Section 78(3) and (4) referred to land in a township which had been transferred to the President in trust for a future local authority. This section has, however, been repealed and replaced by section 86(2) of the Town Planning and Townships Ordinance (Transvaal) 15 of 1986.

2.138 Once again it is unlikely that any such land has been transferred to the President at least since 1996. This is because the concept of a “future local authority” as referred to in section 86 of Ordinance 15 of 1986 does not appear to be consistent with the constitutional and legislative framework governing the establishment of municipalities in South Africa today.

2.139 In addition, section 86 appears in Part B of Chapter III of the Town Planning and Townships Ordinance (Transvaal) 15 of 1986 and this Part applies only to townships which have been or which are going to be established in a local authority which is not an “authorised local authority”. The concept of an “unauthorised local authority” is also not consistent with the constitutional and legislative framework governing the status and the powers of municipalities in South African today.

2.140 Given that it is unlikely that any such land has been transferred to the President at least since 1996, it is possible that the national government may have disposed of all such land. If this is the case then it would serve no purpose to replace the reference to section 78(3) and (4) of the Town Planning and Townships Ordinance (Transvaal) 15 of 1986 with a reference to section 86(2) of the Town Planning and Townships Ordinance (Transvaal) 15 of 1986. The reference to section 78(3) and (4) may, therefore, be repealed.

2.141 Finally, it should also be noted that the Town Planning and Townships Ordinance (Transvaal) 15 of 1986 will be repealed – at least in so far as the province of Gauteng is concerned – when the Gauteng Planning and Development Act 3 of 2003 comes into operation (see section 97 of the Act).

2.142 It is provisionally recommended that the definition of the term “State Land” should be amended as follows:

“State land includes [any land over which the right of disposal by virtue of the provisions of section 3(4) of the Agricultural Holdings (Transvaal) Registration Act, 1919 (Act 22 of 1919), and section 78(3) and (4) of the Town Planning and Townships Ordinance, 1965 (Ordinance 25 of 1965) (Transvaal), vests in the State President, and] any right in respect of State land”.

2.143 Section 2(2): It is provisionally recommended that section 2(2) be amended. Section 2(2) provides as follows:

“The [State] President shall not dispose of any particular State Land in terms of subsection (1) if the disposal thereof is governed by a provincial ordinance: Provided that the provisions of this subsection shall not apply in respect of the lease of the whole or any portion of –

- (a) places upon State land which have been reserved by the [State] President as contemplated in Item 5 of the Second Schedule to the Financial Relations Consolidation and Amendment Act, 1945 (Act 38 of 1945), as being places of public resort, of public recreation, or of historical or scientific interest; and
- (b) State land situated in public resorts, places of rest, seaside resorts, holiday centers, holiday camps, caravan parks, tent camps and picnic places referred to in Item 24 of the Second Schedule of the said Act which cannot lawfully be leased in terms of any such ordinance.”

2.144 Section 2(2) confirms the points made in section 2.2 above. The reference to provincial ordinances, however, is obsolete. As pointed out in section 2.2 above, the disposal of provincial state land today is comprehensively regulated by Acts of the various provincial legislatures.

2.145 In addition, all of the provincial Acts referred to above confer the power to lease provincial state land on the relevant Premier or Member of the Executive Council. There are, consequently, no places on provincial state land or portions of provincial state land which cannot lawfully be leased. The proviso to section 2(2) is therefore redundant.

2.146 Finally, the references to Item 5 and Item 24 of the Second Schedule Financial Relations Consolidation and Amendment Act 38 of 1945 are also obsolete. This is because the Financial Relations Consolidation and Amendment Act was repealed by the Financial Relations Act 65 of 1976, and the Financial Relations Act was repealed by the Constitution of the Republic of South Africa, Act 200 of 1993.

2.147 It is provisionally recommended that section 2(2) should be amended as follows:

2(2). The [State] President shall not dispose of any particular State land in terms of subsection (1) if the disposal thereof is governed by a provincial law [ordinance: Provided that the provisions of this subsection shall not apply in respect of the lease of the whole or any portion of-

(a) places upon State land which have been reserved by the [State] President as contemplated in Item 5 of the Second Schedule to the Financial Relations Consolidation and Amendment Act, 1945 (Act 38 of 1945), as being places of public resort, of public recreation, or of historical or scientific interest; and

(b) State land situated in public resorts, places of rest, seaside resorts, holiday centres, holiday camps, caravan parks, tent camps and picnic places referred to in Item 24 of the Second Schedule to the said Act, which cannot lawfully be leased in terms of any such ordinance].

2.148 Section 8A: It is provisionally recommended that section 8A be amended. Section 8A provides as follows:

“The provisions of this Act shall apply in addition to, and not in substitution for, the provisions of any proclamation or regulation referred to in sections 5(2), 8(2) and 11(2) of the Abolition of Racially Based Land Measures Act, 1991 (Act 108 of 1991).”

2.149 There is a view that the references to section 5(2) and section 8(2) of the Abolition of Racially Based Land Measures Act 108 of 1991 are spent and should be deleted from section 8A. Section 5(2) provided for the continued existence of proclamations made under section 25(1) of the Black Administration Act 38 of 1927, notwithstanding the repeal of section 25(1) itself.

2.150 In terms of section 6(a) of the Repeal of the Black Administration Act and Amendment of Certain Laws Act 28 of 2005, provision was made for the repeal of all such section 25(1) Black Administration Act 38 of 1927 proclamations on 30 September 2007, or such date as it is repealed by a competent authority, whichever occurs first.

2.151 The same argument should be made as regards regulations made under section 30(2) and bylaws made under section 30A(1) of the Black Administration Act 38 of 1927. Section 8(2) of the Abolition of Racially Based Land Measures Act 108 of 1991 provided for the continued existence of such regulations and bylaws. Section 8(2) was, however,

repealed by section 6(b) of the Repeal of the Black Amendment Act and Amendment of Certain Laws Act 28 of 2005 on 30 September 2007, or such date as it is repealed by a competent authority, whichever occurs first.

2.152 It is provisionally recommended that section 8A be amended as follows:

- 8A. The provisions of this Act shall apply in addition to, and not in substitution for, the provisions of any [proclamation or] regulation referred to in section [s 5(2), 8(2) and] 11(2) of the Abolition of Racially Based Land Measures Act, 1991 (Act 108 of 1991).

2.153 The Act does, however, not contain any discriminatory provisions.

2.154 See also item 4 (Statutes provisionally proposed for repeal on the ground of obsolescence) above.

2.155 It is provisionally recommended that:

- (a) Certain sections of the Act be repealed on the basis of its obsolete nature;
- (b) Certain sections of the Act be amended on the basis of its partly obsolete nature; and
- (c) Certain sections of the Act be referred for an interdepartmental review within the national sphere of government.

## **6. Statutes provisionally proposed for retention without amendment**

### **(a) Abolition of Certain Titles and Conditions Act 43 of 1999**

- (i) Provisional proposal

2.156 It is provisionally proposed that the Abolition of Certain Titles and Conditions Act 43 of 1999 be retained without amendment.

- (ii) Evaluation of Abolition of Certain Titles and Conditions Act 43 of 1999

2.157 The Abolition of Certain Titles and Conditions Act 43 of 1999 commenced on 24 November 1999 and provides for the abolition of certain conditions in terms of which the consent or permission of the holder of an office under the Republic, the former Union of South Africa or any *dominium*, colony or republic which preceded the former Union of South

Africa is required for the alienation or transfer of immovable property from one person to another. It provides that specified conditions are excluded from the operation of the Act.

2.158 The Act is administered by the DRDLR.

2.159 With regard to the extent of, and reason for current applicability, the title conditions provided for under the former Union are no longer suitable under the new dispensation. The Act has national application. The Act still applies where land is transferred and one of the conditions specified is still contained in the deed of transfer.

2.160 There are no offending provisions in the Act, and it is recommended that the Act be retained without amendments.

(b) Communal Property Association Act 28 of 1996

(i) Provisional proposal

2.161 It is provisionally proposed that the Communal Property Association Act 28 of 1996 be retained without amendment.

(ii) Evaluation of Communal Property Association Act 28 of 1996

2.162 The Communal Property Association Act 28 of 1996 commenced on 22 May 1996. The purpose of the Act is to enable communities to form juristic persons, to be known as communal property associations (CPAs), in order to acquire, hold and manage property on a basis agreed to by members of a community in terms of a written constitution and to provide for matters connected therewith.

2.163 The Act is administered by the DRDLR.

2.164 The Act consists of 19 sections and one Schedule to the Act. The underlying aim of the Act is to set out the various procedures to form a provisional and thereafter a permanent communal property association. It sets out the practical and legal matters to comply with before such an association can be registered. One of the main functions of the Act is to ensure that the structure and functioning of said associations are in line with the equality principle. Accordingly, various provisions are focused on achieving exactly that, for example ample provisions relating to the drafting (section 6) and adoption (section 7) of the

constitution that forms the basis of the association. In order to be as complete as possible, the Schedule to the Act sets out the various items that have to be addressed in the constitution of each association. Section 9 also lists the principles to be accommodated in constitutions. Apart from regulating the structuring and functioning of these associations, provision is also made for the monitoring and inspection of said associations. In the event of liquidation and deregistration of associations, section 13 becomes relevant. Offences and the delegation of powers are also regulated by the Act.

2.165 The Act sets out the whole process related to the forming of a new juristic person, the CPA; from conceptualisation of a CPA, to the actual establishment of the provisional and thereafter the “final” CPA, as well as its functioning, monitoring and final liquidation or de-registration.

2.166 With regard to the extent of, and reason for current applicability, the Act is important as it provides for a new juristic person that enables communities to gain access to and control over property, including land. Apart from the fact that any community can employ the Act to form their own CPA for purposes of the Act, it often happens that the LCC restores land to communities under the restitution programme on condition that a CPA be formed. The Transformation of Certain Rural Areas Act 94 of 1998 also relied/s rather heavily on CPAs as vehicles of land holding. Case law has shown that CPAs are also employed in relation to labour tenants. The Act therefore has application for as long as communities want to, or are ordered by way of court orders to, hold land on a community basis. It is thus relevant in so far as both redistribution and restitution programmes operate.

2.167 It is provisionally proposed that the Act be retained without amendments.

(c) Deeds Registries Act 47 of 1937

(i) Provisional proposal

2.168 It is provisionally proposed that the Deeds Registries Act 47 of 1937 be retained without amendments.

(ii) Evaluation of Deeds Registries Act 47 of 1937

2.169 The Deeds Registries Act 47 of 1937 commenced on 1 September 1937, and aims to consolidate and amend the legislation relating to the registration of deeds. It provides for the

registration of land, townships and settlements, bonds, rights in immovable property, and antenuptial contracts.

2.170 With regard to the registration of land, every piece of land in the country (including farms, erven, lots, plots and stands) is surveyed and a diagram thereof is framed. A diagram consists of a plan of the piece of land and a description thereof. It also contains numerical data of its size and situation. It is the duty of each registrar to record the diagram of every piece of land situated within the area of his jurisdiction. The following towns have deeds registries: Cape Town, King William's Town, Kimberley, Vryburg, Pietermaritzburg, Pretoria, Bloemfontein and Windhoek. In addition, there is a Rand Townships registration office in Johannesburg.

2.171 In respect of sectional titles, it was not, prior to 30 March 1973, possible to register portions of property. The registration procedure was not concerned with the buildings on the registered land. However, there has been a significant change in the law since the coming into force of the Sectional Titles Act 66 of 1971. The Act introduced new concepts and innovations to the system of land registration in South Africa. The Act *inter alia* provides:

- For the division of land and buildings comprising a development scheme into sections and common property. Thereby the Act creates an entirely new composite thing, namely a unit consisting of a section (an apartment or a commercial unit), and an undivided share in the common property.
- That not only ownership, but also limited real rights (such as notarial leases, mortgage bonds and servitudes) may be registered with regard to portions of buildings under a sectional title scheme.

2.172 With regard to the formalities of registration, a conveyancer must prepare all deeds of transfer, mortgage bonds and certificates of title, which must, thereafter, be attested, executed or registered by the Registrar. Each deed is passed in duplicate original; the Registrar retains one copy for the register and delivers the other to the transferee. Every mortgage bond and every other real right must be endorsed upon both duplicate originals. The real right in the land passes in each case at the moment of registration, i.e. when the deed of transfer, bond, lease or servitude is signed by the Registrar of Deeds. After the registration process had been completed a serial number is allocated to the deed. A synopsis of the registration history of a particular plot of land is therefore accessible to the public at any time. During the past few years, drastic reforms have been introduced by way of micro-filming and computerisation of the data in the deeds office.

2.173 The effect of the registration of a person's name as the owner of a piece of land is that he or she is (in the absence of fraud or of error) the owner of the land and the permanent buildings on it. Similarly, the registration of a *jus in re aliena* in the name of a person confers on him or her the benefit of such right (e.g. a servitude, a mortgage, or an interest in a will which has been registered against the land).

2.174 In spite of the fact that a person has what is termed a 'clean transfer' in his favour (i.e. ownership of a piece of land has been registered in his name without registration or endorsement of any *jus in re aliena*), the ownership of the land, or a real right in it, may, in fact, be legally vested in another person (e.g. ownership may be vested in a spouse by virtue of a marriage in community of property). Registration of a piece of land would nevertheless constitute security of tenure.

2.175 According to the abstract system of transfer of ownership, the invalidity of the agreement creating the obligation does not affect the transfer of ownership if the following two requirements are met:

- The existence of a valid real agreement (which requires that one person has the intention to transfer ownership to another person, and that other person has the intention to acquire ownership); and
- Registration of the transfer (in the case of immovable property) or delivery (in the case of movable property).

2.176 There are no offending provisions in the Act. It is provisionally proposed that the Deeds Registries Act 47 of 1937 be retained without amendment.

(d) Land Administration Act 2 of 1995

(i) Provisional proposal

2.177 It is provisionally proposed that the Land Administration Act 2 of 1995 be retained without amendment.

(ii) Evaluation of Land Administration Act 2 of 1995

2.178 The Land Administration Act 2 of 1995 commenced on 6 April 1995. The Act provides for the delegation of powers and the assignment of the administration of laws regarding land matters to the provinces, and for the creation of uniform land legislation.

2.179 A minister may delegate to a premier or any officer in the service of the national government in writing any power conferred upon him or her by or under a law regarding land matters. This delegated power is exercised subject to the directions of the minister and can be revoked at any time.

2.180 A premier who has been delegated power may further delegate such power to a member of the Executive Council or Director-General of that province.

2.181 A member of the Executive Council may further delegate such power to the Director-General of that province. The Director-General may in turn delegate power to the Director-General of a national department or a province or an officer in the service of the local government as contemplated in section 1 of the Local Government Transition Act of 1993.

2.182 The president may assign the administration of a law regarding land matters to a premier of a province or reassign the administration of a law related to land matters. The DRDLR has not made available a list of assignments and delegations effected in terms of this Act.

2.183 See also item 7 (Statutes provisionally proposed for referral for an interdepartmental review within the national sphere of government) below.

2.184 It is recommended that the Act be retained without amendment. It is not discriminatory and is vital to the proper delegation of power in all land-related matters.

(e) Land Reform (Labour Tenants) Act 3 of 1996

(i) Provisional proposal

2.185 It is provisionally proposed that the Land Reform (Labour Tenants) Act 3 of 1996 be retained without amendment.

(ii) Evaluation of Land Reform (Labour Tenants) Act 3 of 1996

2.186 The Land Reform (Labour Tenants) Act is administered by the DRDLR.

2.187 The Act has two purposes: to protect the circumstances of labour tenancy and to award labour tenants the right to acquire land occupied under the tenancy.

2.188 The definition of labour tenant by the Act constitutes the basis of determining the extent of a labour tenant's statutory right:

“labour tenant” means a person –

- (a) who is residing or has the right to reside on a farm;
- (b) who has or has had the right to use cropping or grazing land on the farm, referred to in paragraph (a) or another farm of the owner, and in consideration of such right provides or has provided labour to the owner or lessee; and
- (c) whose parent or grandparent resided or resides on a farm and had the use of cropping or grazing land on such farm or another farm of the owner, and in consideration of such right provided or provides labour to the owner or lessee of such or such other farm,

including a person who has been appointed a successor to a labour tenant in accordance with the provisions of section 3(4) and (5), but excluding a farmworker;’

2.189 The Act contains elaborate provisions regarding:

- The right of a labour tenant to occupy and use the land together with his or her family;
- The eviction of labour tenants;
- The acquisition of ownership or other rights in land by labour tenants.

2.190 The Act provides that the right which it confers may be terminated only in accordance with the provisions of the Act. Termination may occur, subject to conditions and requirements, on eviction and upon acquisition of ownership, other rights in land or compensation.

2.191 The security of the right of a labour tenant against arbitrary eviction is achieved by the Act's close and rigorous control of the owner's right of eviction. The foundation of this protection lies in requiring an order of the Land Claims Court to effect eviction.

2.192 Chapter III of the Act provides for the acquisition of ownership or other rights in land by labour tenants. A labour tenant or his or her successor may apply for an award of land on

one of three bases identified in the section. The alternatives are: land which the labour tenant is entitled to occupy under section 3 of the Act; land which the labour tenant “or his or her family occupied or used during a period of five years immediately prior to the commencement of this Act, and of which he or she or his or her family was deprived contrary to the terms of an agreement between the parties”; rights in land offered by the owner of the farm elsewhere on the farm or in its vicinity.

2.193 The Act does not contain any discriminatory or obsolete and redundant provisions.

2.194 It is provisionally recommended that the Act be retained without amendment.

(f) Land Titles Adjustment Act 111 of 1993

(i) Provisional proposal

2.195 It is provisionally proposed that the Land Titles Adjustment Act 111 of 1993 be retained without amendment.

(ii) Evaluation of Land Titles Adjustment Act 111 of 1993

2.196 The aim of the Act is to provide registered title to people who claim to be owners of land but do not possess registered title. In other words, the aim is to enable persons who own land, but, as a result of restrictive legislation or failure of an heir or a predecessor to effect transfer, do not have a title deed as proof of ownership. Information about such land may be obtained from any person who is aware of land of which the rightful owner cannot be identified, or from a person who lays claim to ownership without having proof.

2.197 With regard to the scope of application, the Act implicitly applies only in respect of private land. The following are, among others, the circumstances under which the Act may be applied:

- (a) Where owners have not transferred title to the current owner. This is a common scenario on black freehold land where, due to apartheid and other laws (e.g. The Subdivision of Agricultural Land Act 70 of 1970), hereditary successors-in-title or informal transfers were never registered. The owner of the land may be found to be in possession of title deeds dating around the turn of the first century. A mechanism is thus needed which allows for the heirs of successors-in-title to be identified.

- (b) When the documentary proof needed to effect transfer has been lost and transfer cannot be effected in terms of any existing legal remedies.
- (c) Where transfer can be effected in terms of existing legal remedies, but the costs attached to this outweigh the value of the land.

2.198 In relation to the beneficiaries in terms of the Act, any person who claims land of which the rightful owners cannot be identified, or persons who lay claim to ownership without having the necessary proof, has the right to benefit from the Act. Land may be dealt with in accordance with the provisions of the Act only if the Minister of Rural Development and Land Reform is satisfied that the application is valid and designates the land in question by notice in the Government Gazette.

2.199 In respect of the legal nature of the claimants, the following needs to be stated: A claimant or likely owner may be a natural person or a representative of a community where people claim to be owners of land, but do not possess the registered title. Service providers need not make a determination that a community concerned is a legal entity. The criterium is that a claimant may be a representative of a community. It is not necessary to identify each member of such community.

2.200 The following is a synopsis of the title adjustment process:

- (a) The Minister of Rural Development and Land Reform may by notice in the Government Gazette designate land as land to be dealt with in accordance with the provisions of the Act. Such land may be land or portions thereof in respect of which persons lay claim to rightful ownership but for which they cannot submit registered title deeds.
- (b) The Minister may appoint a title adjustment commissioner to deal with the land in accordance with the provisions of the Act.

2.201 The Act contains no discriminatory, obsolete or redundant provisions. See Annexure D where reference is made to (a) the discriminatory nature of a number of pre-1994 legislative instruments and (b) the implications of the Land Titles Adjustment Act 111 of 1993 as regards the adjustment of titles, rights and interests acquired in terms of such pre-1994 legislative instruments.

2.202 It is provisionally proposed that the Act be retained without amendment.

(g) Planning Profession Act 36 of 2002

## (i) Provisional proposal

2.203 It is provisionally proposed that the Planning Profession Act 36 of 2002 be retained without amendment.

## (ii) Evaluation of Planning Profession Act 36 of 2002

2.204 The Planning Profession Act 36 of 2002 commenced on 15 October 2003. The Act provides for the establishment of a South African Council of Planners as a juristic person; for different categories of planners; and for the registration of planners. The Act recognises certain voluntary associations and contains professional conduct guidelines. It provides for the authorisation of the identification of areas of work for planners; the recognition of certain voluntary associations; and the protection of the public from unethical planning practices. It aims to maintain a high standard of professional conduct and integrity, and provides for the establishment of disciplinary measures and an Appeal Board.

2.205 The Act is administered by the DRDLR.

2.206 The Act does not contain any discriminatory provisions. It is provisionally proposed that the Act be retained without amendment.

(h) Professional and Technical Surveyors' Act 40 of 1984

## (i) Provisional proposal

2.207 It is provisionally proposed that the Professional and Technical Surveyors' Act 40 of 1984 be retained without amendment.

## (ii) Evaluation of Professional and Technical Surveyors' Act 40 of 1984

2.208 The Professional and Technical Surveyors' Act 40 of 1984 commenced on 10 September 1984 and provides for the establishment of a South African Council for Professional and Technical Surveyors (sections 2 to 10) and an education advisory committee (sections 11 to 19). It also provides for the registration of professional surveyors, professional surveyors in training, surveyors, survey technicians and survey technicians in

training (sections 20 to 27). Sections 28 to 33 deal with improper conduct, disciplinary proceedings, inquiries, suspensions, appeals against decisions of the council, as well as readmissions. Sections 34 to 36 deal with rules, procedures and evidence, and the rectification of errors. Section 37 deals with liability of the council. Section 39 provides for exemptions from the operation of provisions of the Act, and section 40 for the construction of Act 22 of 1904 of Cape of Good Hope. Sections 42 and 43 provide for the completion of certain inquiries and the transfer of assets and liabilities to the council.

2.209 This Act was declared applicable in the former territories of Bophuthatswana, Ciskei, KwaZulu, Transkei, Venda, Gazankulu, KaNgwane, KwaNdebele, Lebowa and QwaQwa by Proclamation 66 in Government Gazette 16511 of 7 July 1995.

2.210 The Act contains no discriminatory provisions. It is provisionally recommended that it be retained without amendment.

(i) Provision of Land and Assistance Act 126 of 1993 (previous title: Provision of Certain Land for Settlement Act)

(i) Provisional proposal

2.211 It is provisionally proposed that the Provision of Land and Assistance Act 126 of 1993 be retained without amendment.

(ii) Evaluation of Provision of Land and Assistance Act 126 of 1993

2.212 The Provision of Land and Assistance Act 126 of 1993 commenced on 23 July 1993. The Act provides for the designation of certain land; regulates the subdivision of such land and the settlement of persons thereon; provides for the rendering of financial assistance for the acquisition of land and to secure tenure rights; and provides for matters connected therewith.

2.213 The Act is administered by the DRDLR.

2.214 This Act was drafted prior to the democratic elections in 1994. It was initially promulgated to settle persons on agricultural, peri-urban and urban land and commenced before the all-encompassing land reform programme was embarked on in 1994. It was thereafter employed as one of the main vehicles to realise the land redistribution programme

and is still widely used today. The Act consists of only 16 sections. The Act sets out the procedures available to designate land for settlement. It can be either in relation to privately owned land or State-owned land. Development of land is also provided for. The Act has detailed procedures for the identification of the land, as well as for the subdivision and transfer thereof. Technical requirements regarding the surveying and approval of plans are provided for.

2.215 The majority of the Act is focused on registration of ownership. Apart from the technical requirements, the Act also specifically provides for financial assistance, what it entails, and how to access grants. It also sets out the powers of the Minister. The Minister may issue regulations and delegate certain powers. The present formulation also refers to the roles of the Expropriation Act 63 of 1975 and the Minister in the acquisition of land for purposes of this Act.

2.216 The Act has been criticized as not being proactive enough regarding the acquisition of land and the concomitant planning and development.

2.217 With regard to the extent of, and reason for current applicability, this Act is still one of the main vehicles employed in the land redistribution programme under the overall land reform programme. Numerous notices in terms of this Act are regularly published in the Government Gazette. The Act is especially useful in that the designations invariably connect environmental and developmental issues with the initial designation of land. This is noteworthy because environmental conservation and the achievement of development goals are not necessarily included in the various individual land redistribution tools as such. The co-existence of this Act and the Distribution and Transfer of Certain State Land Act 119 of 1993 is not clear, apart from the obvious distinction that the Distribution and Transfer of Certain State Land Act 119 of 1993 is focused on the redistribution and transfer of State land only, and this Act also relates to privately owned land.

2.218 The Act has been amended three times: by the Development Facilitation Act 67 of 1995, the Provision of Certain Land for Settlement Amendment Act 26 of 1998 and the Land Affairs General Amendment Act 11 of 2000. In the course of 2008 various amendments to the Act were furthermore proposed, especially in relation to the powers of the Minister in the acquisition of land to further the objectives of the Act. These found their way into the Provision of Land and Assistance Act 126 of 1993 by means of the enactment of the Provision of Land and Assistance Amendment Act 58 of 2008 (commencement date: 9 January 2009).

2.219 The 2008 amendments to the Act have enhanced the utilisation of the Act, especially in relation to the acquisition of land. The possible overlapping of this Act and the Distribution and Transfer of Certain State Land Act 119 of 1993 needs to be clarified.

2.220 The Act provides a framework for the implementation of a one-stop process, starting from the identification of land to the subdivision and finally, registration of land. It provides for technical requirements as well as financial assistance. Published notices also include references to environmental conservation (e.g. the carrying capacity of land is invariably set out in the notice and compliance with the water legislation is usually specifically provided for) and development. This is made possible by enabling the Minister to make the designation of land conditional (see s 2(3)(a) and (b)). The Act is furthermore useful because the aims encompass designation of land for residential, agricultural production and for small business development – one legislative measure is thus employed for various objectives – all linked with redistribution goals in general.

2.221 The Act does not contain any discriminatory measures. It is provisionally recommended that the Act be retained without amendment.

(j) Restitution of Land Rights Act 22 of 1994

(i) Provisional proposal

2.222 It is provisionally proposed that the Restitution of Land Rights Act 22 of 1994 be retained without amendment.

(ii) Evaluation of Restitution of Land Rights Act 22 of 1994

2.223 The Restitution of Land Rights Act 22 of 1994 commenced on 2 December 1994 and provides for the restitution of rights in land to persons or communities dispossessed of such rights after 19 June 1913 as a result of past racially discriminatory laws or practices. It also provides for the establishment of a Commission on Restitution of Land Rights (sections 4 to 21) and a Land Claims Court (sections 22 - 38), as well as for matters connected therewith.

2.224 Section 2 deals with entitlement to restitution and section 3 with claims against nominees. The Act provides for direct access to the Court in sections 38A to 38E. Section 39 deals with the register of public land, section 42 with transfer duties and fees, and section

42A with the registration of land in the name of the claimant. Section 42C deals with financial aid, section 42D with the powers of the Minister in the case of certain agreements, and section 42E with the acquisition of land, a portion of land, or a right in land for land reform purposes.

2.225 The Act protects the rights of legitimate claimants to restitution. It also lays down the rules for acceptance of claims:

- Claims that are acceptable are those of individuals, families and communities who were forcibly removed from land due to racial laws.
- Only people who were dispossessed of land after 19 June 1913, have a right to restitution.
- Even the rights of people who did not have title deeds are respected. These may be tenancy rights, the right to have access to ancestral graves, the right to graze stock, etc.
- For a claim to be valid, it had to be lodged on or before 31 December 1998.
- Claims of people who received fair and equitable compensation at the time of removal are not acceptable.

2.226 Sometimes it is not possible to restore the original land. This could be due to major buildings being erected or other development activity happening on the claimed land. In such cases it would not be possible to remove the developments without causing social and economic disruption.

2.227 Occasionally, the land claimed is part of a conservation area or a national forest. Claimants have needs for housing, for farming, and to make a living on land. A conservation area cannot meet these needs and at the same time preserve its status as a national heritage. Successful claims in these areas may result in revenue loss, as many of these areas are tourism sites.

2.228 Where the land was converted to a mining site or a military base, successful claims will probably result in risks to the health and safety of claimants.

2.229 A distinction must be drawn between a) cases where specific restoration cannot take place on account of practicalities, and b) cases where the non-restoration of land cannot take place because of restoration not being in the public interest.

2.230 Where original land cannot be restored, claimants may negotiate the following:

- To be allocated alternative land;
- To be paid financial compensation;
- To be given priority to benefit from planned developments on the land, e.g. a housing project or preferential job opportunities;
- To have a stake in the management of a development project on the land claimed, and share in the financial benefits arising from the development.

2.231 The initial final date for lodging of claims was 31 December 1998. Some claims have not yet been finalised. Outstanding cases are generally the more complicated ones.

2.232 The bulk of cases renders it impossible to provide a summary. The main findings of the courts on restitution matters may be found in Tong, M *Jurisprudence on Restitution of Land Rights in South Africa* DLA Commission on Restitution of Land Rights (2007).

2.233 Substantial numbers of historical dispossessed persons and communities have received restitution of property or equitable redress.

2.234 The Act does not contain any redundant or obsolete provisions. None of its provisions are in breach of section 9 of the Constitution.

2.235 It is provisionally recommended that the Act be retained without amendment.

(k) Sectional Titles Act 95 of 1986

(i) Provisional proposal

2.236 It is provisionally proposed that the Sectional Titles Act 95 of 1986 be retained without amendment.

(ii) Evaluation of Sectional Titles Act 95 of 1986

2.237 The Sectional Titles Act 95 of 1986 commenced on 1 June 1988 and provides for the division of buildings into sections and common property, and for the acquisition of separate ownership in sections coupled with joint ownership in common property. It aims to control certain incidents attaching to separate ownership in sections and joint ownership in common

property. In addition, the Act provides for the transfer of ownership of sections and the registration of sectional mortgage bonds and other real rights over sections. The Act regulates the use and enjoyment of the sections and the common property as well as the administration and management of the scheme. In this respect it provides for the establishment of a body corporate and the appointment of trustees and managing agents.

2.238 Sections 4 to 14 deal with development schemes, sectional plans and section title; sections 15 to 19 with registration and common property; and sections 20 to 24 with the subdivision, consolidation and extension of sections. Sections 25 and 26 provide for the extension of schemes, and sections 27 to 31 for the exclusive use of common property and servitudes. Sections 32 to 34 deal with participation quotas and developers, and sections 44 to 50 with owners, premises and buildings.

2.239 The Sectional Titles Act 95 of 1986 is administered by the DRDLR.

2.240 The Sectional Titles Act 95 of 1986 consists of 65 sections. Four of these sections have been repealed. The Act has also been amended on seven occasions. The Act is important for a number of reasons. It has amended the common law principles of ownership to make it possible for a person to acquire individual ownership of a part of a building. As a result of these changes the Act has dramatically increased access to home ownership. Sectional title ownership is a common and popular form of home ownership in South Africa.

2.241 Sections 1(4), 4(10), 20(2), 24(2), 25(7) and 26(3) have been assigned to the provinces under Proclamation R22 of 1997 (Government Gazette 17846 of 14 March 1997).

2.242 With regard to the extent of, and reasons for current applicability, the Act governs the establishment, management, use, and disestablishment of sectional title schemes throughout the Republic. It is currently applicable for the reasons set out above.

2.243 The Sectional Titles Act 95 of 1986 fulfils an important function. For the purposes of this review it does not contain any blatantly discriminatory provisions. It thus appears to be consistent with section 9 of the Constitution. The Act does not, therefore, require amendment in this respect.

2.244 It is provisionally recommended that the Act be retained without amendment.

(l) Spatial Data Infrastructure Act 54 of 2003

## (i) Provisional proposal

2.245 It is provisionally proposed that the Spatial Data Infrastructure Act 54 of 2003 be retained without amendment.

## (ii) Evaluation of Spatial Data Infrastructure Act 54 of 2003

2.246 Different dates of commencement apply to the Spatial Data Infrastructure Act 54 of 2003, viz. sections 1-11, 13, 19-22 came into operation on 8 May 2006. The remaining sections 12, 14-18 will come into operation when the Committee for Spatial Information is established (Government Notice 113 of 2004 dated 4 February 2004).

2.247 The Act is administered by the DRDLR.

2.248 The purpose of the Spatial Data Infrastructure Act is to establish the South African Spatial Data Infrastructure (SASDI), the Committee for Spatial Information and an electronic metadata catalogue; to determine standards and prescriptions with regard to the facilitation of the sharing of spatial information; to capture and publish metadata; and to avoid duplication of such capture.

2.249 With regard to the extent of, and reason for current applicability, the Act is applicable as the SASDI is operative. It is a recent enactment.

2.250 The Act contains no discriminatory measures.

2.251 It is provisionally recommended that the Act be retained without amendment.

(m) Transformation of Certain Rural Areas Act 94 of 1998

## (i) Provisional proposal

2.252 It is provisionally proposed that the Transformation of Certain Rural Areas Act 94 of 1998 be retained without amendment.

## (ii) Evaluation of Transformation of Certain Rural Areas Act 94 of 1998

2.253 The Transformation of Certain Rural Areas Act 94 of 1998 commenced on 2 November 1998. The purpose of the Act is to provide for the transfer of certain land to municipalities and certain other legal entities; for the removal of restrictions on the alienation of land; for the repeal of the Rural Areas Act 9 of 1987, and related laws; and for matters connected therewith.

2.254 The Act is administered by the DRDLR.

2.255 The Act consists of 11 sections and one Schedule setting out the legislative measures to be repealed by this Act. The aim of the Act is to dismantle a particular form of land holding in certain identified rural areas in South Africa. The regime to be dismantled was enabled by the former Rural Areas Act (House of Representatives) 9 of 1987 and the areas involved are all so-called “coloured” areas in mainly the Northern Cape and some areas in the Free State.

2.256 The Act sets out how this regime is to be dismantled, the various stages involved (namely a transitional phase preceding the finalisation of land rights), the persons and bodies involved in the process and the relevant time periods. The underlying principles guiding this process are also set out in the Act (section 4). The Act is open-ended in that it leaves it to the particular communities to decide exactly when and how the process is to take place. This means that change may be effected independently in the different areas. The Act makes a distinction between (a) trust land situated in a township and (b) land outside a township in which the residents have a right to decide to whom transfer should be effected. Procedures for the protection of existing rights and the fiduciary role of municipalities are also provided for. Provision is also made for the removal of restrictive conditions referred to in laws and title deeds. The Act also has general provisions dealing with regulations and the delegation of powers.

2.257 With regard to the extent of, and reason for current applicability, it is unclear exactly how far the process of dismantling the former land holding regime has progressed. It is clear, however, that the underlying idea was not that the Act should remain on the statute books *ad infinitum*, but that it should regulate the process and once the process had been completed, the need for the Act would expire. After the commencement of the Act, the various communities decided by way of referenda to indicate their preferences between the following three entities to receive the land: (a) the municipality, (b) a communal property association, and (c) an option of own choice – including trust ownership and individual title.

In the Namaqualand area the results showed a distinct preference for communal property associations. In almost all of the areas the transitional period had to be extended by way of proclamation in the Government Gazette. This may be an indication that the whole process is perhaps more complicated and time-consuming than what was initially envisaged, and that the dismantling process has not yet been completed.

2.258 Not having all the information at hand regarding the process in the various areas, it is difficult to comment on the present employ and application of the Act. The Act has to be in place for as long as the dismantling process continues. It, therefore, still has a role to play, depending on particular progress in the relevant areas. As mentioned, transitional periods were supposed to be 18 months, but have almost in all instances been extended. The provisions embodying underlying principles (e.g. section 4) are in line with constitutional imperatives. It is proposed that an in-depth study be undertaken in all the relevant areas to establish exactly what the legal position is.

2.259 There are no offending provisions in the Act.

2.260 It is provisionally proposed that the Act be retained without amendment.

(n) Upgrading of Land Tenure Rights Act 112 of 1991

(i) Provisional proposal

2.261 It is provisionally proposed that the Upgrading of Land Tenure Rights Act 112 of 1991 be retained without amendment. This Act should be reviewed in light of the Constitutional Court judgement in *Tongoane v National Minister for Agriculture and Land Affairs* case<sup>19</sup>.

(ii) Evaluation of Upgrading of Land Tenure Rights Act 112 of 1991

2.262 The Upgrading of Land Tenure Rights Act 112 of 1991 commenced on 1 September 1991 and provides for the upgrading and conversion into ownership of certain rights granted in respect of land; as well as for the transfer of tribal land in full ownership to tribes.

2.263 The Act is administered by the DRDLR.

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<sup>19</sup> 4 ibid

2.264 With regard to the extent of, and reason for current applicability, the Act has national application and acts to upgrade certain tenure rights into ownership up until the time when new legislation to replace the Communal Land Rights Act which the Constitutional Court has declared to be unconstitutional commences. The Act aims "to provide for the conversion into full ownership of the more tenuous land rights which had been granted during the apartheid era to Africans" - *Ex Parte Western Cape Provincial Government and Others: In Re DVB Behuising (Pty) Ltd v North West Provincial Government and Another* 2000 (4) BCLR 347 (CC) [par 8].

2.265 The Act as a whole is a necessary legislative tool for the protection of weaker tenure rights (i.e. tenure rights that had been granted under the apartheid era to a majority of black South Africans).

2.266 The Act does not contain any offending provisions.

2.267 It is provisionally proposed that the Act be retained without amendment. This Act should be reviewed in light of the Tongoane judgment above.<sup>20</sup>

(o) KwaZulu-Natal Ingonyama Trust Act No.3KZ of 1994

(i) Provisional proposal

2.268 It is provisionally proposed that the KwaZulu-Natal Ingonyama Trust Act of 1994 be retained without any amendment.

(ii) Evaluation of KwaZulu-Natal Ingonyama Trust Act No.3KZ of 1994

2.269 This is a former Act of the KwaZulu Legislative Assembly which has been given the status of a National Act, due to the fact that it is now administered by the Minister of Rural Development and Land Reform of the National Government, or any other Minister designated by the President. The purpose of the Act is to provide for the establishment of the Ingonyama Trust and for certain land to be held in trust; and to provide for matters incidental thereto.

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<sup>20</sup>

Ibid

2.270 Although the definition of ‘Minister’ in section 1 of the Act refers to ‘the Minister for Agriculture and Land Affairs of the National Government, or another Minister designated by the President’, and section 4 of the Act provides that “the Department of Land Affairs shall bear the cost of the administration of the Board”, however, in terms of Proclamation No.44 of 2009<sup>21</sup>, the responsibility for the administration of legislation previously entrusted to the Minister of Agriculture and Land Affairs has now been transferred to the Minister of Rural Development and Land Reform. Furthermore, in terms of Proclamation 48 of 2009<sup>22</sup>, the name of the Department of Land Affairs was substituted by that of Department of Rural Development and Land Reform.

2.271 As result, the Act does not contain any unconstitutional, redundant or obsolete provisions and should remain on the statute book.

## **7. Statutes provisionally proposed for referral for an interdepartmental review within the national sphere of government**

### **(b) Distribution and Transfer of Certain State Land Act 119 of 1993**

#### **(i) Provisional proposal**

2.272 It is provisionally proposed that a thorough review of the current application of, and future need for, the Distribution and Transfer of Certain State Land Act 119 of 1993 be undertaken by the DRDLR and the DPW.

#### **(ii) Evaluation of Distribution and Transfer of Certain State Land Act 119 of 1993**

2.273 The Distribution and Transfer of Certain State Land Act 119 of 1993 commenced on 20 July 1993. The purpose of the Act is to regulate the distribution and transfer of certain land belonging to the State and designated by the Minister as land to be dealt with in accordance with the provisions of this Act. It also provides for matters connected therewith.

2.274 The Act is administered by the DRDLR, and consists of 20 sections. It is mainly aimed at subdividing land held by the state in its various forms (including land registered in

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<sup>21</sup> Government Gazette No 32367 dated 01 July 2009

<sup>22</sup> Government Gazette No 32387 dated 07 July 2009

the name of a Minister, Premier or former Administrator) and thereafter transferring land to individuals or communities, very often in cases where the identities of the transferees are not readily ascertainable. Large portions of the Act are thus aimed at setting the procedures to advertise the availability of such land and thereafter to ascertain the identities of beneficiaries as well as to setting out the actual procedures of distributing the erstwhile state-owned land. Formal legislative measures regulating the subdivision and registration of land in general are excluded in order to streamline and expedite the process.

2.275 With regard to the extent of, and reason for current applicability, it needs to be emphasised that the Act was drafted prior to the commencement of the democratic South Africa on 27 April 1994 and was thus also aimed at that process. Its applicability was necessary in light of the diverse land control systems at that stage as well as the various “forms” of state-owned land in, amongst others, the self-governing territories, the national states and the rest of South Africa. Immediately after 27 April 1994 the Act was employed to facilitate some of the land reform initiatives. Since its commencement it has been amended only once, namely in 1995 under the Land Affairs General Amendment Act 11 of 1995. However, it is unclear to what extent this Act is still being employed in South Africa today in light of other legislative measures impacting on land reform, e.g. the Provision of Land and Assistance Act 126 of 1993.

2.276 The Act does not contain any offending provisions.

2.277 It is provisionally proposed that a thorough review of the current application of, and future need for, the Act be undertaken by the DRDLR and the DPW.

(c) General Law Second Amendment Act 108 of 1993

(i) Provisional proposal

2.278 It is provisionally proposed that:

- (a) Certain sections of the General Law Second Amendment Act 108 of 1993 be repealed (sections 1 (Principal Act: Water Act 54 of 1956), 2 (Principal Act: Water Act 54 of 1956), 3 (Principal Act: Water Act 54 of 1956), 4 (Principal Act: Water Act 54 of 1956), 5 (Principal Act: Water Act 54 of 1956), 6 (Principal Act: Police Act 7 of 1958), 14 (Principal Act: Financial Relations Act 65 of 1976), 29 (Principal Act: Abolition of Racially Based Land Measures

Act 108 of 1991) and 32 (Principal Act: Upgrading of Land Tenure Rights Act 112 of 1991)) (see discussion below);

- (b) Certain sections of the General Law Second Amendment Act 108 of 1993 be amended (sections 15(d) (Principal Act: Conversion of Certain Rights to Leasehold Act 81 of 1988), 16(h) (Principal Act: Conversion of Certain Rights to Leasehold Act 81 of 1988), 25(b) (Principal Act: Police Third Amendment Act 76 of 1989), 36(2) (Principal Act: South-West Africa Constitution Act 39 of 1968) and 37(1) (Short title and commencement)): (the relevant sections of the Principal Act also need to be amended) (see discussion below); and
  - (c) The remaining sections of the Act be the subject of a thorough review undertaken by Departments of Human Settlement, Police, Environmental Affairs, and Agriculture, Forestry and Fisheries.
- (ii) Evaluation of General Law Second Amendment Act 108 of 1993

2.279 For an evaluation of the General Law Second Amendment Act 108 of 1993 see 4 (Statutes provisionally proposed for repeal on the ground of obsolescence) above.

2.280 The General Law Second Amendment Act 108 of 1993 is administered by a number of different departments (i.e. the DRDLR, the DHS, the Department of Police, the DEA and the DAFF). The Act should therefore be subject to a transversal analysis and the Departments of Human Settlement, Police, Environmental Affairs, and Agriculture, Forestry and Fisheries should be consulted before any amendments are carried out.

2.281 See also item 4 (Statutes provisionally proposed for repeal on the ground of obsolescence) and item 5 (Statutes provisionally proposed for amendment on the basis of its partly discriminatory nature and/or obsolescence) above.

2.282 It is provisionally proposed that:

- (a) Certain sections of the General Law Second Amendment Act 108 of 1993 be repealed (sections 1 (Principal Act: Water Act 54 of 1956), 2 (Principal Act: Water Act 54 of 1956), 3 (Principal Act: Water Act 54 of 1956), 4 (Principal Act: Water Act 54 of 1956), 5 (Principal Act: Water Act 54 of 1956), 6 (Principal Act: Police Act 7 of 1958), 14 (Principal Act: Financial Relations Act 65 of 1976), 29 (Principal Act: Abolition of Racially Based Land Measures Act 108 of 1991) and 32 (Principal Act: Upgrading of Land Tenure Rights Act 112 of 1991)) (see discussion below);

- (b) Certain sections of the General Law Second Amendment Act 108 of 1993 be amended (sections 15(d) (Principal Act: Conversion of Certain Rights to Leasehold Act 81 of 1988), 16(h) (Principal Act: Conversion of Certain Rights to Leasehold Act 81 of 1988), 25(b) (Principal Act: Police Third Amendment Act 76 of 1989), 36(2) (Principal Act: South-West Africa Constitution Act 39 of 1968) and 37(1) (Short title and commencement)): (the relevant sections of the Principal Act also need to be amended) (see discussion below); and
  - (c) The remaining sections of the Act be the subject of a thorough review undertaken by Departments of Human Settlement, Police, Environmental Affairs, and Agriculture, Fisheries and Forestry.
- (d) Kimberly Leasehold Conversion to Freehold Act 40 of 1961
- (i) Provisional proposal

2.283 It is provisionally proposed that the Kimberly Leasehold Conversion to Freehold Act 40 of 1961 be retained and referred to the DRDLR to determine whether there is a need to retain the Act or whether it can be repealed.

- (ii) Evaluation of Kimberly Leasehold Conversion to Freehold Act 40 of 1961

2.284 The Kimberly Leasehold Conversion to Freehold Act 20 of 1961 commenced on 30 May 1961, and has as its purpose the transfer of the ownership of certain erven at Kimberly to the lessees or licencees thereof; as well as the exemption from the payment of certain duties and fees and the performance of certain acts in pursuance thereof. The Act also provides for the amendment of the General Law Amendment Act 68 of 1957 (section 19).

2.285 The Kimberly Leasehold Conversion to Freehold Act 20 of 1961 provides for the exclusion of certain erven from certain township plans (section 2); for the opening of a township register (section 4); and for applications for transfer of ownership of erven (section 5). Section 6 provides for deeds of transfer of erven, and section 7 for the conversion of certain cessions into mortgage bonds. Section 8 deals with suspensive agreements relating to leases (or licences) of erven, and section 9 with the transfer of undivided share in an erf. Section 10 provides for the effect of registration of a title deed, and section 12 for the amendment of a certified general plan.

2.286 With regard to the extent of, and reason for current applicability, the Act has specific application and regulates the leasehold conversion process.

2.287 There are no offending provisions in the Act.

2.288 It is provisionally proposed that the Act be retained and referred to the DRDLR to determine whether there is a need to retain the Act or whether it can be repealed.

(e) Land Administration Act 2 of 1995

(i) Provisional proposal

2.289 It is provisionally proposed that the Land Administration Act 2 of 1995 be retained and referred for an interdepartmental review within the national sphere of government (the DRDLR and the DPW).

(ii) Evaluation of Land Administration Act 2 of 1995

2.290 For an evaluation of the Land Administration Act 2 of 1995, see item 6 (Statutes provisionally proposed for retention without amendment) above.

2.291 A minister may delegate to a premier or any officer in the service of the national government in writing any power conferred upon him or her by or under a law regarding land matters. This delegated power is exercised subject to the directions of the minister and can be revoked at any time.

2.292 A premier who has been delegated power may further delegate such power to a member of the Executive Council or Director-General of that province.

2.293 A member of the Executive Council may further delegate such power to the Director-General of that province.

2.294 The Director-General may in turn delegate power to the Director-General of a national department or a province or an officer in the service of the local government as contemplated in section 1 of the Local Government Transition Act of 1993.

2.295 The president may assign the administration of a law regarding land matters to a premier of a province or reassign the administration of a law related to land matters.

2.296 The DRDLR has not made available a list of delegations and assignments effected in terms of this Act. The Act is not discriminatory and is vital to the proper delegation of power in all land related matters.

2.297 See also item 6 (Statutes provisionally proposed for retention without amendment) above.

2.298 It is recommended that the Act be retained and referred for an interdepartmental review within the national sphere of government (the DRDLR and the DPW).

(f) Land Affairs Act 101 of 1987

(i) Provisional proposal

2.299 It is provisionally proposed that the Land Affairs Act 101 of 1987 be referred to a joint meeting of the DPW and the DRDLR to determine which sections of the Act are currently administered by which department and whether there is a need for the retention of the Act. Within this context, the effect of a possible repeal on assets, rights, liabilities and obligations that may have been incurred in terms of the Act, should be considered.

(ii) Evaluation of Land Affairs Act 101 of 1987

2.300 The Land Affairs Act 101 of 1987 commenced on 1 May 1988 and provides for the determination of amounts of compensation, purchase prices or rents in respect of immovable property that was expropriated, purchased or leased by the DPW and the DRDLR for public purposes. It also provides for the giving of advice with regard to the value of land, rights, purchase prices or rents in respect of certain immovable property. One of its purposes was to establish a Land Affairs Board (section 2 to 10). Section 12 provides for the disposal of certain assets, rights, liabilities and obligations, and section 13 for the interpretation of certain expressions.

2.301 There are no offending provisions in the Act. It is provisionally proposed that the Land Affairs Act 101 of 1987 be referred to a joint meeting of the DPW and the DRDLR to determine which sections of the Act are currently administered by which department and

whether there is a need for the retention of the Act. Within this context, the effect of a possible repeal on assets, rights, liabilities and obligations that may have been incurred in terms of the Act, should be considered.

(g) Physical Planning Act 88 of 1967

(i) Provisional proposal

2.302 It is provisionally proposed that the Physical Planning Act 88 of 1967 be amended in consultation with the DEA as well as the provincial government departments responsible for urban and rural development. It is proposed that section 13 be repealed.

(ii) Evaluation of Physical Planning Act 88 of 1967

2.303 For an evaluation of the Physical Planning Act 88 of 1967, see item 5 (Statutes provisionally proposed for amendment on the basis of its partly discriminatory nature and/or obsolescence) above.

2.304 The Act is administered by the Minister or Premier to whom the administration of any provision has been assigned by Proclamation issued under section 13B.

2.305 The Act is pre-1994 legislation, assigned to the Provinces in terms of Proc R47 in Government Gazette No.17375 of 23 August 1996. The following sections have been assigned to provincial premiers: Section 8, as well as sections 9A and 12 in so far as they are necessary for the administration of section 8, and in so far as the said sections have not been repealed by section 36 of the Physical Planning Act 125 of 1991.

2.306 This Act is still applicable only in respect of guide plans, controlled areas, restrictions on the use of land in those areas, permits, and exemptions. Many of its provisions regarding guide plans have been superseded by the provisions in the Local Government: Municipal Systems Act 32 of 2002 (Chapter 5: dealing with Integrated Development Planning). The Land Use Management Bill B27-2008 provided in clause 77 that the Act is to be repealed. (See also the Explanatory Summary of Land Use Management Bill, 2008, Government Gazette No.30973 dated 15 April 2008.) The Land Use Management Bill [B27-2008] has, however, been withdrawn, and is currently being redrafted.

2.307 With regard to section 9 of the Constitution, section 13 of this Act (Exclusion of Black Areas) is probably discriminatory and unconstitutional. Section 9A may be in conflict with s14 of the Constitution (the right to privacy) as a designated officer may enter without a warrant and conduct searches, etc.

2.308 It is provisionally proposed that the Act should be amended in consultation with the DEA as well as the provincial government departments responsible for urban and rural development (on account of a number of sections having been assigned to provincial premiers, and the fact that urban and rural development is a functional area of concurrent national and provincial legislative competence). It is proposed that section 13 be repealed.

(h) State Land Disposal Act 48 of 1961

(i) Provisional proposal

2.309 It is provisionally recommended that:

- (a) Certain sections of the Act be repealed on the basis of its obsolete nature;
- (b) Certain sections of the Act be amended on the basis of its partly obsolete nature; and
- (c) Certain sections of the Act be referred for an interdepartmental review within the national sphere of government.

(ii) Evaluation of the State Land Disposal Act 48 of 1961

2.310 For an evaluation of the State Land Disposal Act 48 of 1961, see item 5 (Statutes provisionally proposed for amendment on the basis of its partly discriminatory nature and/or obsolescence) above.

2.311 The State Land Disposal Act 48 of 1961 is administered by both the DRDLR and the DPW and it confers powers on both the Minister for Rural Development and Land Reform and the Minister for Public Works. It should, therefore, be subject to a transversal review process and the DPW should be consulted before any amendments are carried out.

2.312 The Act does, however, contain a number of obsolete and possible spent provisions. In addition, it does not accurately reflect the current system of national and provincial government, or the distinction that may be drawn between national state land and provincial state land.

2.313 The Act fulfils an important function. For the purposes of this review, it does not contain any discriminatory provisions. It thus appears to be consistent with section 9 of the Constitution. The Act does not, therefore, require amendment in this respect. There are, however, a number of provisions which are obsolete or spent and it is provisionally proposed that these be amended.

2.314 It is provisionally proposed that the definition of state land in section 1 be amended to reflect more accurately the distinction that may be drawn between national state land and provincial state land. Given, however, that such a change will have consequential effects on other provisions of the Act, for example section 3 which prohibits the acquisition of state land by means of acquisitive prescription, it is strongly recommended that the DRDLR and the DPW be consulted before any such amendment is made.

2.315 Apart from the fact that it does not accurately reflect the distinction that may be drawn between national state land and provincial state land, the definition of the term "State land" may also have to be amended because the references to section 3(4) of the Agricultural Holdings (Transvaal) Registration Act 22 of 1919 and sections 78(3) and (4) of the Town Planning and Townships Ordinance (Transvaal) 25 of 1965 may be obsolete.

2.316 Section 3(4) of the Agricultural Holdings (Transvaal) Registration Act 22 of 1919 refers to land which has been set aside for educational or other public purposes and which has been transferred to the President in return for being granted a certificate by the Minister exempting the area in which the land is located, and which has been divided into lots for the purpose of creating agricultural holdings, from certain provisions of the Town Planning and Townships Ordinance 11 of 1931.

2.317 It is unlikely that any such land has been transferred to the President since 1957. This is on account of the fact that the Agricultural Holdings (Transvaal) Registration Act 22 of 1919 was repealed in 1957 except in so far as it related to land which had already been divided into agricultural holdings and in respect of which a certificate had already been issued. The Agricultural Holdings (Transvaal) Registration Act 22 of 1919 was repealed by the Transvaal Provincial Council when it enacted section 36 of the Division of Land Ordinance (Transvaal) 20 of 1957 (the power to repeal the Agricultural Holdings (Transvaal) Registration Act 22 of 1919 was conferred on the Transvaal Provincial Council by section 4 of the Provincial Powers Extension Act 10 of 1944).

2.318 Given that it is unlikely that any such land has been transferred to the President since 1957, it is possible that the national government may have disposed of all such land. If this is the case then the purpose for which the reference to section 3(4) of the Agricultural Holdings (Transvaal) Registration Act 22 of 1919 was included in the definition of “State land” has been fulfilled. The reference to section 3(4) of the Agricultural Holdings (Transvaal) Registration Act 22 of 1919 may, therefore, be repealed.

2.319 A somewhat similar argument may also be made in respect of the reference to section 78(3) and (4) of the Town Planning and Townships Ordinance (Transvaal) 25 of 1965. Section 78(3) and (4) referred to land in a township which had been transferred to the President in trust for a future local authority. This section has, however, been repealed and replaced by section 86(2) of the Town Planning and Townships Ordinance (Transvaal) 15 of 1986 (which was assigned by the President in terms of section 235 of the Constitution of the Republic of South Africa 200 of 1993 to Gauteng, Limpopo, Mpumalanga and North West).

2.320 Once again it is unlikely that any such land has been transferred to the President at least since 1996. This is because the concept of a “future local authority” as referred to in section 86 of Ordinance 15 of 1986 does not appear to be consistent with the constitutional and legislative framework governing the establishment of municipalities in South Africa today.

2.321 In addition, section 86 appears in Part B of Chapter III of the Town Planning and Townships Ordinance (Transvaal) 15 of 1986 and this Part applies only to townships which have been or which are going to be established in a local authority which is not an “authorised local authority”. The concept of an “unauthorised local authority” is also not consistent with the constitutional and legislative framework governing the status and the powers of municipalities in South African today.

2.322 Given that it is unlikely that any such land has been transferred to the President at least since 1996, it is possible that the national government may have disposed of all such land. If this is the case then it would serve no purpose to replace the reference to section 78(3) and (4) of the Town Planning and Townships Ordinance (Transvaal) 15 of 1986 with a reference to section 86(2) of the Town Planning and Townships Ordinance (Transvaal) 15 of 1986. The reference to section 78(3) and (4) may, therefore, be repealed.

2.323 Finally, it should also be noted that the Town Planning and Townships Ordinance (Transvaal) 15 of 1986 will be repealed – at least in so far as the province of Gauteng is

concerned – when the Gauteng Planning and Development Act 3 of 2003 comes into operation (see section 97 of the Act).

2.324 With regard to section 2(2), the following need to be noted: Section 2(2) confirms the points made above. The reference to provincial ordinances, however, is obsolete. As pointed out above, the disposal of provincial state land today is comprehensively regulated by Acts of the various provincial legislatures.

2.325 In addition, all of the provincial Acts referred to above confer the power to lease provincial state land on the relevant Premier or Member of the Executive Council. There are, consequently, no places on provincial state land or portions of provincial state land which cannot lawfully be leased. The proviso to section 2(2) is therefore redundant.

2.326 It is provisionally recommended that:

- (a) Certain sections of the Act be repealed on the basis of its obsolete nature;
- (b) Certain sections of the Act be amended on the basis of its partly obsolete nature; and
- (c) Certain sections of the Act be referred for an interdepartmental review within the national sphere of government.

## **8. Statutes provisionally proposed for referral for an interdepartmental review within two or more spheres of government**

### (a) KwaZulu Land Affairs Amendment Act 48 of 1998

- (i) Provisional proposal

2.327 It is provisionally proposed that the KwaZulu Land Affairs Amendment Act 48 of 1998 as well as the KwaZulu Land Affairs Act 11 of 1992 be referred to a joint meeting of the KZN Provincial Government and the DRDLR, as major parts of the Act were assigned to the Province.

- (ii) Evaluation of KwaZulu Land Affairs Amendment Act 48 of 1998

2.328 The KwaZulu Land Affairs Amendment Act 48 of 1998 commenced on 11 September 1998 and aims to amend the KwaZulu Land Affairs Act 11 of 1992, so as to validate certain

acts purporting to have been performed in terms of that Act. The KwaZulu Land Affairs Amendment Act 48 of 1998 also provides for matters connected therewith.

2.329 The whole of the KwaZulu Land Affairs Act 11 of 1992 was assigned to the Province of KwaZulu-Natal in terms of Proclamation R63 of 1998 (Government Gazette No.18978 of 19 June 1998), excluding sections 11, 24, 25, 26, 29, 30 and 36, in so far as it is applicable in, or in a part of, the Province of KwaZulu-Natal.

2.330 The KwaZulu Land Affairs Act 11 of 1992 was amended by section 52 of the Division of Revenue Act 2 of 2008, with effect from 1 November 2008. Proclamation R9 of 1997 (Government Gazette No.17753 of 31 January 1997) also amended the KwaZulu Land Affairs Act 11 of 1992 (with effect from 31 January 1997) by substituting and deleting certain definitions, amending section 9 and the references contained therein to registration officers; amending sections 11, 19, 30, 36, 37, 39, repealing section 35, and inserting Schedule II .

2.331 See also item 9 (Statutes provisionally proposed for referral to the provincial sphere of government on account of such statutes having been assigned to provincial premiers) below.

2.332 Because major parts of the Act were assigned to the Province, it is provisionally proposed that the KwaZulu Land Affairs Amendment Act 48 of 1998 as well as the KwaZulu Land Affairs Act 11 of 1992 be referred to a joint meeting of the KZN Provincial Government and the DRDLR.

(b) Physical Planning Act 88 of 1967

(i) Provisional proposal

2.333 It is provisionally proposed that the Physical Planning Act 88 of 1967 be amended in consultation with the DEA as well as the provincial government departments responsible for urban and rural development. It is proposed that section 13 be repealed.

(ii) Evaluation of Physical Planning Act 88 of 1967

2.334 For an evaluation of the Physical Planning Act 88 of 1967, see 5 (Statutes provisionally proposed for amendment on the basis of its partly discriminatory nature and/or obsolescence) above.

2.335 The Act is administered by the Minister or Premier to whom the administration of any provision has been assigned by Proclamation issued under section 13B.

2.336 The Act is pre-1994 legislation, assigned to the Provinces in terms of Proclamation R47 in Government Gazette No.17375 of 23 August 1996. The following sections have been assigned to provincial premiers: Section 8, as well as sections 9, 9A and 12 in so far as they are necessary for the administration of section 8, and in so far as the said sections have not been repealed by section 36 of the Physical Planning Act 125 of 1991.

2.337 This Act is still applicable only in respect of guide plans, controlled areas, restrictions on the use of land in those areas, permits, and exemptions. Many of its provisions regarding guide plans have been superseded by the provisions in the Local Government: Municipal Systems Act 32 of 2002 (Chapter 5: dealing with Integrated Development Planning). The Land Use Management Bill B27-2008 provided in clause 77 that the Act is to be repealed. (See also the Explanatory Summary of Land Use Management Bill, 2008, Government Gazette 30973 dated 15 April 2008.) The Land Use Management Bill [B27-2008] has, however, been withdrawn, and is currently being redrafted.

2.338 With regard to section 9 of the Constitution, section 13 of this Act (Exclusion of Black Areas) is probably discriminatory and unconstitutional. Section 9A may be in conflict with s14 of the Constitution (the right to privacy) as a designated officer may enter without a warrant and conduct searches, etc.

2.339 See also 5 (Statutes provisionally proposed for amendment on the basis of its partly discriminatory nature and/or obsolescence) and 7 (Statutes provisionally proposed for referral for an interdepartmental review within the national sphere of government) above.

2.340 It is provisionally proposed that the Act be amended in consultation with the DWEA as well as the provincial government departments responsible for urban and rural development (on account of a number of sections having been assigned to provincial premiers, and the fact that urban and rural development is a functional area of concurrent national and provincial legislative competence). It is proposed that section 13 be repealed.

(c) Removal of Restrictions Act 84 of 1967

(i) Provisional proposal

2.341 It is provisionally proposed that the Removal of Restrictions Act 84 of 1967 be amended in consultation with the provincial government departments responsible for urban and rural development (on account of a number of sections having been assigned to provincial premiers, and the fact that urban and rural development is a functional area of concurrent national and provincial legislative competence). To the extent that this may also affect the functional domain of municipal planning, local government should also be consulted.

(ii) Evaluation of Removal of Restrictions Act 84 of 1967

2.342 The Removal of Restrictions Act 84 of 1967 commenced on 26 June 1967 and aims to empower the Premier of a province to alter, suspend or remove certain restrictions and obligations in respect of land in the province either on his/her own accord or on application by any person (sections 2 to 6). Detailed provisions set out the procedure to be followed from the time an application is made, to the objection phase, to approval or rejection of the application. It provides for the repeal of the Removal of Restrictions in Townships Act 48 of 1946 and the validation of certain proclamations of Administrators (section 8). The Act does not affect the validity of existing ordinances (section 9).

2.343 The House of Assembly Debates (1967 cols 7524-7525) indicate that the reasons for the enactment were that effective town planning and provision of houses should not be hampered by obsolete restrictive conditions on land and to eradicate the confusion which had resulted from decisions under the repealed Removal of Restrictions in Townships Act 48 of 1946.

2.344 The Act is administered by the DRDLR.

2.345 The administration of the whole Removal of Restrictions Act 84 of 1967, except section 5, (and excluding those provisions which fall outside the functional areas specified in Schedule 6 to the 1993 Constitution or which relate to matters referred to in paragraphs (a) to (e) of section 126 (3) of the 1993 Constitution) was assigned to the provinces in terms of section 235(8) of the Interim Constitution, 1993 (see Proclamation R160 in Government Gazette No.16049 dated 31 October 1994).

2.346 The Act still applies in most of the provinces in South Africa, excluding Gauteng, which has its own Removal of Restrictions Act 3 of 1996, and the Northern Cape, where the

procedures are contained in the Northern Cape Planning and Development Act 7 of 1998. The Western Cape Planning and Development Act 7 of 1999 and the KwaZulu-Natal Planning and Development Act 6 of 2008 envisage similar procedures but these Acts are not yet in operation.

2.347 The Act was, however, listed as one of the Acts to be repealed by the Land Use Management Bill [B27-2008] (see clause 77 read with schedule 2). See also the Explanatory Summary of Land Use Management Bill, 2008, in Government Gazette No.30973 dated 15 April 2008. Similar provisions to the provisions of the Removal of Restrictions Act 84 of 1967 are included in the proposed Act. The Land Use Management Bill [B27-2008] has, however, been withdrawn, and is currently being redrafted.

2.348 The Act does not contain any discriminatory measures.

2.349 It is provisionally proposed that the Act should be amended in consultation with the provincial government departments responsible for urban and rural development (on account of a number of sections having been assigned to provincial premiers, and the fact that urban and rural development is a functional area of concurrent national and provincial legislative competence). To the extent that this may also affect the functional domain of municipal planning, local government should also be consulted.

**9. Statutes provisionally proposed for referral to the provincial sphere of government on account of such statutes having been assigned to provincial premiers**

(a) KwaZulu Land Affairs Amendment Act 48 of 1998

(i) Provisional proposal

2.350 It is provisionally proposed that the KwaZulu Land Affairs Amendment Act 48 of 1998 as well as the KwaZulu Land Affairs Act 11 of 1992 be referred to a joint meeting of the KZN Provincial Government and the DRDLR, as major parts of the Act were assigned to the Province.

(ii) Evaluation of KwaZulu Land Affairs Amendment Act 48 of 1998

2.351 For an evaluation of the KwaZulu Land Affairs Amendment Act 48 of 1998, see 8 (Statutes provisionally proposed for referral for an interdepartmental review within two or more spheres of government).

2.352 The whole of the KwaZulu Land Affairs Act 11 of 1992 was assigned to the Province of KwaZulu-Natal in terms of Proclamation R63 of 1998 (Government Gazette No.18978 of 19 June 1998), excluding sections 11, 24, 25, 26, 29, 30 and 36, in so far as it is applicable in, or in a part of, the Province of KwaZulu-Natal.

2.353 The KwaZulu Land Affairs Act 11 of 1992 was amended by section 52 of the Division of Revenue Act 2 of 2008, with effect from 1 November 2008. Proclamation R9 of 1997 (Government Gazette No.17753 of 31 January 1997) also amended the KwaZulu Land Affairs Act 11 of 1992 (with effect from 31 January 1997) by substituting and deleting certain definitions, amending section 9 and the references contained therein to registration officers; amending sections 11, 19, 30, 36, 37, 39, repealing section 35, and inserting Schedule II .

2.354 Because major parts of the Act were assigned to the Province, it is provisionally proposed that the KwaZulu Land Affairs Amendment Act 48 of 1998 as well as the KwaZulu Land Affairs Act 11 of 1992 be referred to a joint meeting of the KZN Provincial Government and the DRDLR.

**10. Examples of pre-1994 race-based legislation that has not been repealed (some of which have been assigned to the provinces, and some of which are at the national level of government)**

2.355 It is suggested that a separate process be initiated to identify, inventorise, review and analyse all the race-based legislation that used to regulate, and, to a significant extent, still regulates, land tenure and land administration in the former TBVC countries, the former self-governing territories and the former SADT areas. These statutory instruments have by and large not been repealed. Parts of this body of law have been assigned to the provinces, with the remainder still vesting in the national sphere of government. As indicated in Annexure D it is proposed that a separate process be initiated jointly by the DRDLR and the provincial government departments concerned.

## **Annexure A**

### **RURAL DEVELOPMENT AND LAND REFORM GENERAL LAWS AMENDMENT AND REPEAL BILL**

#### **GENERAL EXPLANATORY NOTE:**

[     ] Unless otherwise indicated words in bold type in square brackets indicate omissions from existing enactments.

\_\_\_\_\_ Unless otherwise indicated words underlined with a solid line indicate insertions in existing enactments.

#### **BILL**

**To amend and repeal certain laws of the Republic pertaining to land reform and administration containing discriminatory or obsolete provisions**

**BE IT ENACTED** by the Parliament of the Republic of South Africa, as follows:

#### **Amendment of laws**

1. The laws specified in Schedule 1 are hereby amended to the extent set out in the fourth column of the Schedule.

#### **Repeal of laws**

2. (a) The laws specified in Schedule 2 are hereby repealed.
- (b) The laws specified in Schedule 3 are hereby repealed to the extent set out in the third column of Schedule 3.

#### **Short title and commencement**

3. This Act is called the Rural Development and Land Reform General Laws Amendment and Repeal Act, and comes into operation on a date determined by the President by proclamation in the Gazette.

## SCHEDULE 1

Item No.	No. and year of law	Title and subject	Extent of amendment
1.	108 of 1993	General Law Second Amendment Act	<p>15(d) “publish’, in relation to a notice, means the publication of the notice – (a) by publishing it either in the <i>Official Gazette</i> of the province concerned or in [an Afrikaans and in an English newspaper] <u>two newspapers with different official languages as its main language</u> circulating in the area concerned; ... ”</p> <p>24 provides that: “The following section is hereby substituted for section 13 of the Conversion of Certain Rights to Leasehold Act, 1988: This Act shall be called the Conversion of Certain Rights into Leasehold or Ownership Act, 1988, and shall come into operation on a date fixed by the [State] President by proclamation in the <i>Gazette</i>.</p> <p>37(1) This Act shall be called the General Law Second Amendment Act, 1993[, and shall come into operation on a date fixed by the State President by proclamation in the <i>Gazette</i>].</p>
2.	31 of 1996	Interim Protection of Informal Land Rights Act	<p>2. Deprivation of informal rights to land.</p> <p>(2) Where land is held on a communal basis, a person may, subject to subsection (4), be deprived of such</p>

			land or right in land in accordance with the custom and usage of that community, <u>if the custom or usage concerned is in accordance with the law.</u>
3.	88 of 1967	Physical Planning Act	<p>9A(1) The Director General may, whenever he or she suspects that any provision of this Act or a condition imposed in terms of section <b>[2 or] 8</b> is being contravened or not being complied with on any premises, give written instructions to an officer in his <u>or her</u> Department with a rank not lower than that of administrative officer to conduct any investigation necessary to ascertain whether such contravention or failure is taking place.</p> <p>(2) When such an officer conducts any investigation under subsection (1) he <u>or she</u> may, <u>without warrant, on reasonable grounds and taking the exigencies of the situation into account</u></p> <p>=</p> <p>(a) [at any time during the day, without previous notice,] enter any premises and thereon make such examination and enquiry as may be necessary for the conduct of such investigation;</p> <p>(b) [at any time and at any place] require of any person who has in her <u>or her</u> possession or custody or under his <u>or her</u> control any book, document or other thing, the production to him <u>or her</u> of that book, document or other thing [there and then or] at a time and place</p>

			<p>fixed by him <u>or her</u>;</p> <p>(c) examine and make extracts from or copies of any such book, document or other thing and require of any person an explanation of any entries therein, and seize any such book, document or other thing as, in his <u>or her</u> opinion, may afford evidence of a contravention of or failure to comply with any provision or condition mentioned in subsection (1);</p> <p>(d) question[, either alone or in the presence of] any person[, as] he <u>or she</u> thinks fit[,] with respect to any matter relevant to any such investigation[ ,any person whom he finds on any premises entered under this section] ;</p> <p>(f) require <u>of</u> any person who he <u>or she</u> has reasonable grounds for believing is in possession of information relevant to any such investigation [,] to appear before him or her at a time and place fixed by him <u>or her</u> and [then and there] question that person concerning any matter relevant to such investigation.</p>
4.	48 of 1961	State Land Disposal Act	<p>1. 'State land' includes any [land over which the right of disposal by virtue of the provisions of section 3 (4) of the Agricultural Holdings (Transvaal) Registration Act, 1919 (Act 22 of 1919), and section 78 (3) and (4) of the Townplanning and Townships Ordinance, 1965 (Ordinance 25 of 1965) (Transvaal), vests in the State President, and any] rights in respect of State land.</p>

			<p>2(2). The [State] President shall not dispose of any particular State land in terms of subsection (1) if the disposal thereof is governed by a provincial <u>law</u> [ordinance: Provided that the provisions of this subsection shall not apply in respect of the lease of the whole or any portion of-</p> <p>(a) places upon State land which have been reserved by the [State] President as contemplated in Item 5 of the Second Schedule to the Financial Relations Consolidation and Amendment Act, 1945 (Act 38 of 1945), as being places of public resort, of public recreation, or of historical or scientific interest; and</p> <p>(b) State land situated in public resorts, places of rest, seaside resorts, holiday centres, holiday camps, caravan parks, tent camps and picnic places referred to in Item 24 of the Second Schedule to the said Act, which cannot lawfully be leased in terms of any such ordinance].</p> <p>8A. The provisions of this Act shall apply in addition to, and not in substitution for, the provisions of any [proclamation or] regulation referred to in section[s 5 (2), 8 (2) and] 11 (2) of the Abolition of Racially Based Land Measures Act, 1991 (Act 108 of 1991).</p> <p>(f) By the substitution of the term</p>
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			“State President” for President wherever it appears in sections 2(1), 2A(1) and (2), 5(1) and (2), 6(1) and 6(2) and 8.
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## SCHEDULE 2

Item No.	No. and year of law	Title or subject of law
1.	68 of 1951	Black Authorities Act
2.	3 of 1966	Community Development Act
3.	125 of 1991	Physical Planning Act
4.	62 of 1997	Extension of Security of Tenure Act
5.	11 of 2004	Communal Land Rights Act

## SCHEDULE 3

Item No.	No. and year of law	Title and subject	Extent of repeal
1.	108 of 1993	General Law Second Amendment Act 1993	Repeal sections 1, 2, 3, 4, 5, 6, 14, 29 and 32.
2.	8 of 1997	Land Survey Act 1997	Repeal sections 49 and 50, and Schedule II of the Act.
3.	88 of 1967	Physical Planning Act 1967	Repeal section 13.
4.	48 of 1961	State Land Disposal Act 1961	Repeal section 2B.

**Annexure B****STATUTES ADMINISTERED BY THE DEPARTMENT OF RURAL DEVELOPMENT AND  
LAND REFORM (AS PROVIDED BY DRDLR)****AMENDMENT LEGISLATION**

<b>No.</b>	<b>Name of Act, number and year</b>
1.	Abolition of Racially Based Land Measures Amendment Act, 1992 (Act No.133 of 1992)
2.	Black Administration Amendment Act, 1942 (Act No.42 of 1942)
3.	Black Administration Amendment Act, 1956 (Act No.42 of 1956)
4.	Black Laws Amendment Act, 1949 (Act No.56 of 1949)
5.	Black Laws Amendment Act, 1952 (Act No.54 of 1952)
6.	Black Laws Amendment Act, 1962 (Act No.46 of 1962)
7.	Black Laws Amendment Act, 1974 (Act No.70 of 1974)
8.	Black Laws Amendment Act, 1976 (Act No.4 of 1976)
9.	Community Development Amendment Act, 1967 (Act No.42 of 1967)
10.	Community Development Amendment Act, 1968 (Act No.58 of 1968)
11.	Community Development Amendment Act, 1970 (Act No.74 of 1970)
12.	Community Development Amendment Act, 1971 (Act No.68 of 1971)
13.	Community Development Amendment Act, 1972 (Act No.93 of 1972)
14.	Community Development Amendment Act, 1975 (Act No.19 of 1975)
15.	Community Development Amendment Act, 1977 (Act No.126 of 1977)
16.	Community Development Amendment Act, 1978 (Act No.19 of 1978)
17.	Community Development Amendment Act, 1980 (Act No.12 of 1980)
18.	Community Development Amendment Act, 1982 (Act No.26 of 1982)
19.	Community Development Amendment Act, 1983 (Act No.64 of 1983)
20.	Community Development Amendment Act, 1984 (Act No.20 of 1984)
21.	Community Development Amendment Act, 1986 (Act No.48 of 1986)
22.	Deeds Registries Amendment Act, 1953 (Act No.15 of 1953)
23.	Deeds Registries Amendment Act, 1957 (Act No.43 of 1957)
24.	Deeds Registries Amendment Act, 1962 (Act No.43 of 1962)
25.	Deeds Registries Amendment Act, 1965 (Act No.87 of 1965)
26.	Deeds Registries Amendment Act, 1969 (Act No.61 of 1969)
27.	Deeds Registries Amendment Act, 1972 (Act No.3 of 1972)

28.	Deeds Registries Amendment Act, 1977 (Act No.41 of 1977)
29.	Deeds Registries Amendment Act, 1978 (Act No.92 of 1978)
30.	Deeds Registries Amendment Act, 1980 (Act No.44 of 1980)
31.	Deeds Registries Amendment Act, 1982 (Act No.27 of 1982)
32.	Deeds Registries Amendment Act, 1984 (Act No.62 of 1984)
33.	Deeds Registries Amendment Act, 1987 (Act No.75 of 1987)
34.	Deeds Registries Amendment Act, 1989 (Act No.24 of 1989)
35.	Deeds Registries Amendment Act, 1993 (Act No.14 of 1993)
36.	Deeds Registries Amendment Act, 1996 (Act No.11 of 1996)
37.	Deeds Registries Amendment Act, 1998 (Act No.93 of 1998)
38.	Deeds Registries Amendment Act, 2003 (Act No.9 of 2003)
39.	KwaZulu-Natal Ingonyama Trust Amendment Act, 1997 (Act No.9 of 1997)
40.	Land Administration Amendment Act, 1996 (Act No.52 of 1996)
41.	Land Affairs General Amendment Act, 1995 (Act No.11 of 1995)
42.	Land Affairs General Amendment Act, 1998 (Act No.61 of 1998)
43.	Land Affairs General Amendment Act, 2000 (Act No.11 of 2000)
44.	Land Affairs General Amendment Act, 2001 (Act No.51 of 2001)
45.	Land Restitution and Reform Laws Amendment Act, 1996 (Act No.78 of 1996)
46.	Land Restitution and Reform Laws Amendment Act, 1997 (Act No.63 of 1997)
47.	Land Restitution and Reform Laws Amendment Act, 1999 (Act No.18 of 1999)
48.	Land Survey Amendment Act, 1981 (Act No.26 of 1981)
49.	Physical Planning Amendment Act, 1983 ( Act No.87 of 1983)
50.	Physical Planning Amendment Act, 1984 ( Act No.104 of 1984)
51.	Physical Planning Amendment Act, 1985 ( Act No.92 of 1985)
52.	Professional Land Surveyors' and Technical Surveyors' Amendment Act, 1986 (Act No.37 of 1986)
53.	Professional Land Surveyors' and Technical Surveyors' Amendment Act, 1987 (Act No.66 of 1987)
54.	Professional Land Surveyors' and Technical Surveyors' Amendment Act, 1993 (Act No.34 of 1993)
55.	Provision of Certain Land for Settlement Amendment Act, 1998 (Act No.26 of 1998)
56.	Regional and Land Affairs General Amendment Act, 1993 (Act No.89 of 1993)
57.	Regional and Land Affairs Second General Amendment Act, 1993 (Act No.170 of 1993)
58.	Removal of Restrictions Amendment Act, 1977 (Act No.55 of 1977)
59.	Removal of Restrictions Amendment Act, 1984 (Act No.18 of 1984)

60.	Restitution of Land Rights Amendment Act, 1995 (Act No.84 of 1995)
61.	Restitution of Land Rights Amendment Act, 2003 (Act No.54 of 2003)
62.	Second Community Development Amendment Act, 1982 (Act No.68 of 1982)
63.	Sectional Titles Amendment Act, 1991 (Act No.63 of 1991)
64.	Sectional Titles Amendment Act, 1992 (Act No.7 of 1992)
65.	Sectional Titles Amendment Act, 1993 (Act No.15 of 1993)
66.	Sectional Titles Amendment Act, 1997 (Act No.44 of 1997)
67.	Sectional Titles Amendment Act, 2003 (Act No.29 of 2003)
68.	State Land Disposal Amendment Act, 1968 (Act No.28 of 1968)
69.	State Land Disposal Amendment Act, 1976 (Act No.26 of 1976)
70.	State Land Disposal Amendment Act, 1982 (Act No.66 of 1982)
71.	State Land Disposal Amendment Act, 1987 (Act No.47 of 1987)
72.	State Land Disposal Amendment Act, 1988 (Act No.19 of 1988)
73.	Town and Regional Planners Amendment Act, 1987 (Act No.48 of 1987)
74.	Town and Regional Planners Amendment Act, 1988 (Act No.20 of 1988)
75.	Town and Regional Planners Amendment Act, 1990 (Act No.37 of 1990)
76.	Town and Regional Planners Amendment Act, 1993 (Act No.28 of 1993)
77.	Town and Regional Planners Amendment Act, 1995 (Act No.3 of 1995) [Principal Act has been repealed]
78.	Upgrading of Land Tenure Rights Amendment Act, 1996 (Act No.34 of 1996)

### PRINCIPAL LEGISLATION

No.	Name of Act, number and year
1.	Abolition of Certain Titles and Conditions Act, 1999 (Act No.43 of 1999)
2.	Black Authorities Act, 1951 (Act No.68 of 1951)
3.	Communal Property Association Act, 1996 (Act No.28 of 1996)
4.	Communal Land Rights Act, 2004 (Act No.11 of 2004)
5.	Community Development Act, 1966 (Act No.3 of 1966)
6.	Deeds Registries Act, 1937 (Act No.47 of 1937)
7.	Development Facilitation Act, 1995 (Act No.67 of 1995)
8.	Distribution and Transfer of Certain State Land Act, 1993 (Act No.119 of 1993)
9.	Extension of Security of Tenure Act, 1997 (Act No.62 of 1997)
10.	General Law Second Amendment Act, 1993 (Act No. 108 of 1993)
11.	Interim Protection of Informal Land Rights Act, 1996 (Act No.31 of 1996)
12.	Kimberly Leasehold Conversion to Freehold Act, 1961 (Act No.40 of 1961)

13.	KwaZulu Land Affairs Amendment Act, 1998 (Act No. 48 of 1998)
14.	Land Administration Act, 1995 (Act No.2 of 1995)
15.	Land Affairs Act, 1987 (Act No.101 of 1987)
16.	Land Reform (Labour Tenants) Act, 1996 (Act No.3 of 1996)
17.	Land Survey Act, 1997 (Act No.8 of 1997)
18.	Land Titles Adjustment Act, 1993 (Act No.111 of 1993)
19.	Manufacturing Development Act, 1993 (Act No.187 of 1993)
20.	Physical Planning Act, 1967( Act No.88 of 1967)
21.	Physical Planning Act, 1991 ( Act No.125 of 1991)
22.	Planning Profession Act, 2002 (Act No.36 of 2002)
23.	Professional and Technical Surveyors' Act, 1984 (Act No.40 of 1984)
24.	Provision of Land and Assistance Act (previous title: Provision of Certain Land for Settlement Act), 1993 (Act No.126 of 1993)
25.	Removal of Restrictions Act, 1967 (Act No.84 of 1967)
26.	Restitution of Land Rights Act, 1994 (Act No.22 of 1994)
27.	Sectional Titles Act, 1986 (Act No.95 of 1986)
28.	Spatial Data Infrastructure Act, 2003 (Act No.54 of 2003)
29.	State Land Disposal Act, 1961 (Act No.48 of 1961)
30.	Transformation of Certain Rural Areas Act, 1998 (Act No.94 of 1998)
31.	Upgrading of Land Tenure Rights Act, 1991 (Act No.112 of 1991)
32.	KwaZulu-Natal Ingonyama Trust Act, 1994 (No.3KZ of 1994)

### CONSOLIDATED LIST OF AMENDMENT AND PRINCIPAL LEGISLATION

No.	Name of Act, number and year
1.	Abolition of Certain Titles and Conditions Act, 1999 (Act No.43 of 1999)
2.	Abolition of Racially Based Land Measures Act, 1991 (Act No.108 of 1991)
3.	Abolition of Racially Based Land Measures Amendment Act, 1992 (Act No.133 of 1992)
4.	Black Administration Amendment Act, 1942 (Act No.42 of 1942)
5.	Black Administration Amendment Act, 1956 (Act No.42 of 1956)
6.	Black Authorities Act, 1951 (Act No.68 of 1951)
7.	Black Laws Amendment Act, 1949 (Act No.56 of 1949)
8.	Black Laws Amendment Act, 1952 (Act No.54 of 1952)
9.	Black Laws Amendment Act, 1962 (Act No.46 of 1962)
10.	Black Laws Amendment Act, 1974 (Act No.70 of 1974)
11.	Black Laws Amendment Act, 1976 (Act No.4 of 1976)

12.	Black Manufacturing Development Act, 1993 (Act No.187 of 1993)
13.	Communal Property Association Act, 1996 (Act No.28 of 1996)
14.	Communal Land Rights Act, 2004 (Act No.11 of 2004)
15.	Community Development Act, 1966 (Act No.3 of 1966)
16.	Community Development Amendment Act, 1967 (Act No.42 of 1967)
17.	Community Development Amendment Act, 1968 (Act No.58 of 1968)
18.	Community Development Amendment Act, 1970 (Act No.74 of 1970)
19.	Community Development Amendment Act, 1971 (Act No.68 of 1971)
20.	Community Development Amendment Act, 1972 (Act No.93 of 1972)
21.	Community Development Amendment Act, 1975 (Act No.19 of 1975)
22.	Community Development Amendment Act, 1977 (Act No.126 of 1977)
23.	Community Development Amendment Act, 1978 (Act No.19 of 1978)
24.	Community Development Amendment Act, 1980 (Act No.12 of 1980)
25.	Community Development Amendment Act, 1982 (Act No.26 of 1982)
26.	Community Development Amendment Act, 1983 (Act No.64 of 1983)
27.	Community Development Amendment Act, 1984 (Act No.20 of 1984)
28.	Community Development Amendment Act, 1986 (Act No.48 of 1986)
29.	Deeds Registries Act, 1937 (Act No.47 of 1937)
30.	Deeds Registries Amendment Act, 1953 (Act No.15 of 1953)
31.	Deeds Registries Amendment Act, 1957 (Act No.43 of 1957)
32.	Deeds Registries Amendment Act, 1962 (Act No.43 of 1962)
33.	Deeds Registries Amendment Act, 1965 (Act No.87 of 1965)
34.	Deeds Registries Amendment Act, 1969 (Act No.61 of 1969)
35.	Deeds Registries Amendment Act, 1972 (Act No.3 of 1972)
36.	Deeds Registries Amendment Act, 1977 (Act No.41 of 1977)
37.	Deeds Registries Amendment Act, 1978 (Act No.92 of 1978)
38.	Deeds Registries Amendment Act, 1980 (Act No.44 of 1980)
39.	Deeds Registries Amendment Act, 1982 (Act No.27 of 1982)
40.	Deeds Registries Amendment Act, 1984 (Act No.62 of 1984)
41.	Deeds Registries Amendment Act, 1987 (Act No.75 of 1987)
42.	Deeds Registries Amendment Act, 1989 (Act No.24 of 1989)
43.	Deeds Registries Amendment Act, 1993 (Act No.14 of 1993)
44.	Deeds Registries Amendment Act, 1996 (Act No.11 of 1996)
45.	Deeds Registries Amendment Act, 1998 (Act No.93 of 1998)
46.	Deeds Registries Amendment Act, 2003 (Act No.9 of 2003)

47.	Development Facilitation Act, 1995 (Act No.67 of 1995)
48.	Distribution and Transfer of Certain State Land Act, 1993 (Act No.119 of 1993)
49.	Extension of Security of Tenure Act, 1997 (Act No.62 of 1997)
50.	General Law Second Amendment Act, 1993 (Act No.108 of 1993)
51.	Interim Protection of Informal Land Rights Act, 1996 (Act No.31 of 1996)
52.	Kimberly Leasehold Conversion to Freehold Act, 1961 (Act No.40 of 1961)
53.	KwaZulu Land Affairs Amendment Act, 1998 (Act No.48 of 1998)
54.	KwaZulu-Natal Ingonyama Trust Amendment Act, 1997 (Act No.9 of 1997)
55.	Land Administration Act, 1995 (Act No.2 of 1995)
56.	Land Administration Amendment Act, 1996 (Act No.52 of 1996)
57.	Land Affairs Act, 1987 (Act No.101 of 1987)
58.	Land Affairs General Amendment Act, 1995 (Act No.11 of 1995)
59.	Land Affairs General Amendment Act, 1998 (Act No.61 of 1998)
60.	Land Affairs General Amendment Act, 2000 (Act No.11 of 2000)
61.	Land Affairs General Amendment Act, 2001 (Act No.51 of 2001)
62.	Land Reform (Labour Tenants) Act, 1996 (Act No.3 of 1996)
63.	Land Restitution and Reform Laws Amendment Act, 1996 (Act No.78 of 1996)
64.	Land Restitution and Reform Laws Amendment Act, 1997 (Act No.63 of 1997)
65.	Land Restitution and Reform Laws Amendment Act, 1999 (Act No.18 of 1999)
66.	Land Survey Act, 1997 (Act No.8 of 1997)
67.	Land Survey Amendment Act, 1981 (Act No.26 of 1981)
68.	Land Titles Adjustment Act, 1993 (Act No.111 of 1993)
69.	Physical Planning Act, 1967( Act No.88 of 1967)
70.	Physical Planning Act, 1991 ( Act No.125 of 1991)
71.	Physical Planning Amendment Act, 1983 (Act No.87 of 1983)
72.	Physical Planning Amendment Act, 1984 ( Act No.104 of 1984)
73.	Physical Planning Amendment Act, 1985 ( Act No.92 of 1985)
74.	Planning Profession Act, 2002 (Act No.36 of 2002)
75.	Professional and Technical Surveyors' Act, 1984 (Act No.40 of 1984)
76.	Professional Land Surveyors' and Technical Surveyors' Amendment Act, 1986 (Act No.37 of 1986)
77.	Professional Land Surveyors' and Technical Surveyors' Amendment Act, 1987 (Act No.66 of 1987)
78.	Professional Land Surveyors' and Technical Surveyors' Amendment Act, 1993 (Act No.34 of 1993)

79.	Provision of Certain Land for Settlement Amendment Act, 1998 (Act No.26 of 1998)
80.	Provision of Land and Assistance Act (previous title: Provision of Certain Land for Settlement Act), 1993 (Act No.126 of 1993)
81.	Regional and Land Affairs General Amendment Act, 1993 (Act No.89 of 1993)
82.	Regional and Land Affairs Second General Amendment Act, 1993 (Act No.170 of 1993)
83.	Removal of Restrictions Act, 1967 (Act No.84 of 1967)
84.	Removal of Restrictions Amendment Act, 1977 (Act No.55 of 1977)
85.	Removal of Restrictions Amendment Act, 1984 (Act No.18 of 1984)
86.	Restitution of Land Rights Act, 1994 (Act No.22 of 1994)
87.	Restitution of Land Rights Amendment Act, 1995 (Act No.84 of 1995)
88.	Restitution of Land Rights Amendment Act, 2003 (Act No.54 of 2003)
89.	Second Community Development Amendment Act, 1982 (Act No.68 of 1982)
90.	Sectional Titles Act, 1986 (Act No.95 of 1986)
91.	Sectional Titles Amendment Act, 1991 (Act No.63 of 1991)
92.	Sectional Titles Amendment Act, 1992 (Act No.7 of 1992)
93.	Sectional Titles Amendment Act, 1993 (Act No.15 of 1993)
94.	Sectional Titles Amendment Act, 1997 (Act No.44 of 1997)
95.	Sectional Titles Amendment Act, 2003 (Act No.29 of 2003)
96.	Spatial Data Infrastructure Act, 2003 (Act No.54 of 2003)
97.	State Land Disposal Act, 1961 (Act No.48 of 1961)
98.	State Land Disposal Amendment Act, 1968 (Act No.28 of 1968)
99.	State Land Disposal Amendment Act, 1976 (Act No.26 of 1976)
100.	State Land Disposal Amendment Act, 1982 (Act No.66 of 1982)
101.	State Land Disposal Amendment Act, 1987 (Act No.47 of 1987)
102.	State Land Disposal Amendment Act, 1988 (Act No.19 of 1988)
103.	Town and Regional Planners Amendment Act, 1987 (Act No.48 of 1987)
104.	Town and Regional Planners Amendment Act, 1988 (Act No.20 of 1988)
105.	Town and Regional Planners Amendment Act, 1990 (Act No.37 of 1990)
106.	Town and Regional Planners Amendment Act, 1993 (Act No.28 of 1993)
107.	Town and Regional Planners Amendment Act, 1995 (Act No.3 of 1995) [Principal Act has been repealed]
108.	Transformation of Certain Rural Areas Act, 1998 (Act No.94 of 1998)
109.	Upgrading of Land Tenure Rights Act, 1991 (Act No.112 of 1991)
110.	Upgrading of Land Tenure Rights Amendment Act, 1996 (Act No.34 of 1996)

## Annexure C

## CATEGORISATION OF ACTS

CATEGORY	ACTS
<p>1. Statutes that have been repealed and are provisionally proposed to be entirely removed from the DRDLR list of legislation.</p>	<ul style="list-style-type: none"> <li>• Black Administration Amendment Act, 1942 (Act No.42 of 1942)</li> <li>• Black Administration Amendment Act, 1956 (Act No.42 of 1956)</li> <li>• Black Laws Amendment Act, 1949 (Act No.56 of 1949)</li> <li>• Black Laws Amendment Act, 1952 (Act No.54 of 1952)</li> <li>• Black Laws Amendment Act, 1962 (Act No.46 of 1962)</li> <li>• Black Laws Amendment Act, 1974 (Act No.70 of 1974)</li> <li>• Black Laws Amendment Act, 1976 (Act No.4 of 1976)</li> <li>• Community Development Amendment Act, 1967 (Act No.42 of 1967)</li> <li>• Community Development Amendment Act, 1968 (Act No.58 of 1968)</li> <li>• Community Development Amendment Act, 1970 (Act No.74 of 1970)</li> <li>• Community Development Amendment Act, 1971 (Act No.68 of 1971)</li> <li>• Community Development Amendment Act, 1972 (Act No.93 of 1972)</li> <li>• Community Development Amendment Act, 1975 (Act No.19 of 1975)</li> <li>• Community Development Amendment Act, 1977 (Act No.126 of 1977)</li> <li>• Community Development Amendment Act, 1978 (Act No.19 of 1978)</li> </ul>

	<ul style="list-style-type: none"> <li>• Community Development Amendment Act, 1980 (Act No.12 of 1980)</li> <li>• Community Development Amendment Act, 1982 (Act No.26 of 1982)</li> <li>• Community Development Amendment Act, 1983 (Act No.64 of 1983)</li> <li>• Community Development Amendment Act, 1984 (Act No.20 of 1984)</li> <li>• Community Development Amendment Act, 1986 (Act No.48 of 1986)</li> <li>• General Law Second Amendment Act, 1993 (Act No.108 of 1993)</li> <li>• Land Survey Amendment Act, 1981 (Act No.26 of 1981)</li> </ul>
<p>2. Amendment Acts that do not contain substantive provisions standing on their own, but only amend the principal legislation concerned</p>	<ul style="list-style-type: none"> <li>• Deeds Registries Amendment Act, 1953 (Act No.15 of 1953)</li> <li>• Deeds Registries Amendment Act, 1957 (Act No.43 of 1957)</li> <li>• Deeds Registries Amendment Act, 1962 (Act No.43 of 1962)</li> <li>• Abolition of Racially Based Land Measures Amendment Act, 1991 (Act No.108 of 1991)</li> <li>• Abolition of Racially Based Land Measures Amendment Act, 1992 (Act No.133 of 1992)</li> <li>• Deeds Registries Amendment Act, 1965 (Act No.87 of 1965)</li> <li>• Deeds Registries Amendment Act, 1969 (Act No.61 of 1969)</li> <li>• Deeds Registries Amendment Act, 1972 (Act No.3 of 1972)</li> <li>• Deeds Registries Amendment Act, 1977 (Act No.41 of 1977)</li> <li>• Deeds Registries Amendment Act, 1978</li> </ul>

	<p>(Act No.92 of 1978)</p> <ul style="list-style-type: none"> <li>• Deeds Registries Amendment Act, 1980 (Act No.44 of 1980)</li> <li>• Deeds Registries Amendment Act, 1982 (Act No.27 of 1982)</li> <li>• Deeds Registries Amendment Act, 1984 (Act No.62 of 1984)</li> <li>• Deeds Registries Amendment Act, 1987 (Act No.75 of 1987)</li> <li>• Deeds Registries Amendment Act, 1989 (Act No.24 of 1989)</li> <li>• Deeds Registries Amendment Act, 1993 (Act No.14 of 1993)</li> <li>• Deeds Registries Amendment Act, 1996 (Act No.11 of 1996)</li> <li>• Deeds Registries Amendment Act, 1998 (Act No.93 of 1998)</li> <li>• Deeds Registries Amendment Act, 2003 (Act No.9 of 2003)</li> <li>• KwaZulu-Natal Ingonyama Trust Amendment Act, 1997 (Act No.9 of 1997)</li> <li>• Land Administration Amendment Act, 1996 (Act No.52 of 1996)</li> <li>• Land Affairs General Amendment Act, 1995 (Act No.11 of 1995)</li> <li>• Land Affairs General Amendment Act, 1998 (Act No.61 of 1998)</li> <li>• Land Affairs General Amendment Act, 2000 (Act No.11 of 2000)</li> <li>• Land Affairs General Amendment Act, 2001 (Act No.51 of 2001)</li> <li>• Land Restitution and Reform Laws Amendment Act, 1996 (Act No.78 of 1996)</li> <li>• Land Restitution and Reform Laws</li> </ul>
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	<p>Amendment Act, 1997 (Act No.63 of 1997)</p> <ul style="list-style-type: none"> <li>• Land Restitution and Reform Laws Amendment Act, 1999 (Act No.18 of 1999)</li> <li>• Physical Planning Amendment Act, 1983 ( Act No.87 of 1983)</li> <li>• Physical Planning Amendment Act, 1984 ( Act No.104 of 1984)</li> <li>• Physical Planning Amendment Act, 1985 ( Act No.92 of 1985)</li> <li>• Professional Land Surveyors' and Technical Surveyors' Amendment Act, 1986 (Act No.37 of 1986)</li> <li>• Professional Land Surveyors' and Technical Surveyors' Amendment Act, 1987 (Act No.66 of 1987)</li> <li>• Professional Land Surveyors' and Technical Surveyors' Amendment Act, 1993 (Act No.34 of 1993)</li> <li>• Provision of Certain Land for Settlement Amendment Act, 1998 (Act No.26 of 1998)</li> <li>• Regional and Land Affairs General Amendment Act, 1993 (Act No.89 of 1993)</li> <li>• Regional and Land Affairs Second General Amendment Act, 1993 (Act No.170 of 1993)</li> <li>• Removal of Restrictions Amendment Act, 1977 (Act No.55 of 1977)</li> <li>• Removal of Restrictions Amendment Act, 1984 (Act No.18 of 1984)</li> <li>• Restitution of Land Rights Amendment Act, 1995 (Act No.84 of 1995)</li> <li>• Restitution of Land Rights Amendment</li> </ul>
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	<p>Act, 2003 (Act No.54 of 2003)</p> <ul style="list-style-type: none"> <li>• Second Community Development Amendment Act, 1982 (Act No.68 of 1982)</li> <li>• Sectional Titles Amendment Act, 1991 (Act No.63 of 1991)</li> <li>• Sectional Titles Amendment Act, 1992 (Act No.7 of 1992)</li> <li>• Sectional Titles Amendment Act, 1993 (Act No.15 of 1993)</li> <li>• Sectional Titles Amendment Act, 1997 (Act No.44 of 1997)</li> <li>• Sectional Titles Amendment Act, 2003 (Act No.29 of 2003)</li> <li>• State Land Disposal Amendment Act, 1968 (Act No.28 of 1968)</li> <li>• State Land Disposal Amendment Act, 1976 (Act No.26 of 1976)</li> <li>• State Land Disposal Amendment Act, 1982 (Act No.66 of 1982)</li> <li>• State Land Disposal Amendment Act, 1987 (Act No.47 of 1987)</li> <li>• State Land Disposal Amendment Act, 1988 (Act No.19 of 1988)</li> <li>• Town and Regional Planners Amendment Act, 1987 (Act No.48 of 1987)</li> <li>• Town and Regional Planners Amendment Act, 1988 (Act No.20 of 1988)</li> <li>• Town and Regional Planners Amendment Act, 1990 (Act No.37 of 1990)</li> <li>• Town and Regional Planners Amendment Act, 1993 (Act No.28 of 1993)</li> </ul>
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	<ul style="list-style-type: none"> <li>• Town and Regional Planners Amendment Act, 1995 (Act No.3 of 1995) [Principal Act has been repealed]</li> <li>• Upgrading of Land Tenure Rights Amendment Act, 1996 (Act No.34 of 1996)</li> </ul>
3. Statutes provisionally proposed for repeal on the ground of unconstitutionality	<ul style="list-style-type: none"> <li>• Communal Land Rights Act 11 of 2004;</li> <li>• Extension of Security of Tenure Act 62 of 1997</li> </ul>
4. Statutes provisionally proposed for repeal on the ground of obsolescence	<ul style="list-style-type: none"> <li>• Community Development Act 3 of 1966</li> <li>• Development Facilitation Act 67 of 1995 (proposed to be repealed and replaced by a comprehensive Land Use Management Act)</li> <li>• General Law Second Amendment Act 108 of 1993 (Certain sections)</li> <li>• Land Survey Act 8 of 1997 (Certain sections)</li> <li>• Physical Planning Act 125 of 1991</li> <li>• State Land Disposal Act 48 of 1961</li> <li>• Black Authorities Act 68 of 1951</li> </ul>
5. Statutes provisionally proposed for amendment on the basis of its partly discriminatory nature and/or obsolescence	<ul style="list-style-type: none"> <li>• General Law Second Amendment Act 108 of 1993 (certain sections) (the relevant sections of the Principal Act also need to be amended)</li> <li>• Interim Protection of Informal Land Rights Act 31 of 1996</li> <li>• Physical Planning Act 88 of 1967</li> <li>• State Land Disposal Act 48 of 1961</li> </ul>
6. Statutes provisionally proposed for retention without amendment	<ul style="list-style-type: none"> <li>• Abolition of Certain Titles and Conditions Act 43 of 1999</li> <li>• Communal Property Association Act 28 of 1996</li> </ul>

	<ul style="list-style-type: none"> <li>• Deeds Registries Act 47 of 1937</li> <li>• Land Administration Act 2 of 1995</li> <li>• Land Reform (Labour Tenants) Act 3 of 1996</li> <li>• Land Titles Adjustment Act 111 of 1993</li> <li>• Planning Profession Act 36 of 2002</li> <li>• Professional and Technical Surveyors' Act 40 of 1984</li> <li>• Provision of Land and Assistance Act (previous title: Provision of Certain Land for Settlement Act) 126 of 1993</li> <li>• Restitution of Land Rights Act 22 of 1994</li> <li>• Sectional Titles Act 95 of 1986</li> <li>• Spatial Data Infrastructure Act 54 of 2003</li> <li>• Transformation of Certain Rural Areas Act 94 of 1998</li> <li>• Upgrading of Land Tenure Rights Act 112 of 1991</li> <li>• KwaZulu-Natal Ingonyama Trust Act, 1994 (No.3KZ of 1994)</li> </ul>
<p>7. Statutes provisionally proposed for referral for an interdepartmental review within the national sphere of government</p>	<ul style="list-style-type: none"> <li>• Distribution and Transfer of Certain State Land Act 119 of 1993</li> <li>• General Law Second Amendment Act 108 of 1993</li> <li>• Kimberly Leasehold Conversion to Freehold Act 40 of 1961</li> <li>• Land Administration Act 2 of 1995</li> <li>• Land Affairs Act 101 of 1987</li> <li>• Physical Planning Act 88 of 1967</li> <li>• State Land Disposal Act 48 of 1961</li> <li>•</li> </ul>
<p>8. Statutes provisionally proposed for referral for an interdepartmental review</p>	<ul style="list-style-type: none"> <li>• KwaZulu Land Affairs Amendment Act 48 of 1998</li> </ul>

within two or more spheres of government	<ul style="list-style-type: none"> <li>• Physical Planning Act 88 of 1967</li> <li>• Removal of Restrictions Act 84 of 1967</li> </ul>
9. Statutes provisionally proposed for referral to the provincial sphere of government on account of such statutes having been assigned to provincial premiers	<ul style="list-style-type: none"> <li>• KwaZulu Land Affairs Amendment Act 48 of 1998</li> </ul>
10. Examples of pre-1994 race-based legislation that has not been repealed (some of which have been assigned to the provinces, and some of which are at the national level of government)	

## **Annexure D**

### **BRIEF OVERVIEW OF ISSUES RELATING TO PRE-1994 LAND LEGISLATION**

#### **A. INTRODUCTION**

This overview highlights the necessity to launch an in depth inquiry into pre-1994 land-related principal and subordinate legislation. Although some of these laws are falling into oblivion, rights to use and control such land have been and are acquired in terms thereof. In given instances, ownership has been and is vested in terms of such legislation.

All these laws were enacted within the context of, and in furtherance of, race-related ideologies (colonialism, segregation and apartheid). These race-based statutory instruments also contain gender discriminatory provisions. In addition, they are outdated and are not in conformity with the current constitutional, legislative and policy frameworks.

These laws do not appear on the DRDLR list submitted to the South African Law Reform Commission.

#### **B. BRIEF BACKGROUND<sup>23</sup>**

In 1910 the four colonies were united as the Union of South Africa by means of both British legislation and the enactment of the 1910 Constitution of the Union of South Africa. By then the framework had already been laid for race-based differentiated (and discriminatory) policy, statutory and administrative structures and systems for the occupation and utilisation, as well as the allocation, surveying and administration, of land in South Africa, and in some parts, also the establishment of reserves for Black traditional communities and the concomitant forced removal of communities and individuals.

The post-1910 South African governments (segregationist, apartheid and homeland) built on this race-based legacy and further developed differentiated race-based policies and

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<sup>23</sup> This section is based on *Land Tenure Systems for Traditional Communities in South Africa*, to be published in Auclair, C (ed) 2009 *Land Titling and Communal Tenure Systems: A Comparative Overview* (provisional title) Ottawa; Du Plessis W 2008 *Land Law Study Guide* (North West University); and various articles on land matters published by Pienaar J, Du Plessis W en Olivier NJJ on an annual basis in the SA Public Law from 1991 onwards.

legislation that resulted in, amongst others, forced removals (mostly without any compensation), a prohibition on Black people acquiring or occupying any land outside of the officially recognized traditional community areas (the reserves), and the continued implementation of a weak and skewed statutory form of communal land tenure. As is indicated below, the 1948 election victory of the National Party resulted in a major ideological shift, i.e. the consolidation of the reserve areas in ten homelands, with the intention that they should evolve from a system of limited self-government to full independence.

With the commencement of the Constitution of the Republic of South Africa 200 of 1993 on 27 April 1994, South Africa was confronted by a very skewed and uneven land status quo as regards land distribution patterns, access to land, tenure forms and land administration systems. In order to address this, South Africa has initiated a series of land reform programmes, mandated (as indicated below) by the Constitution of the Republic of South Africa, 1996. The three programmes are:

- (a) The Restitution Programme aims to restore land to the descendants of communities and individuals who had been removed from ancestral land in terms of Colonial and apartheid legislation.
- (b) The Redistribution Programme provides government–subsidised access to commercial agricultural land and land for small-scale farming to emerging black farmers who in the past were excluded from acquiring such land on account of Colonial and apartheid legislation.
- (c) The Tenure Reform Programme consists of four parts:
  1. The conversion of Colonial and post-Colonial permits and less secure rights in urban areas to ownership and other forms of secure rights;
  2. The improvement of security of title in respect of, as well as the regulation of access to and the management of, the so called Coloured Rural Areas (in terms of the Transformation of Certain Rural Areas Act 94 of 1998);
  3. The allocation and protection of tenure rights of different categories of farm workers; and
  4. The transformation of communal tenure by the
    - transfer of communal areas occupied by traditional communities to the communities concerned (currently registered in the name of the RSA

government and held in trust by the RSA government in trust for the said communities), and

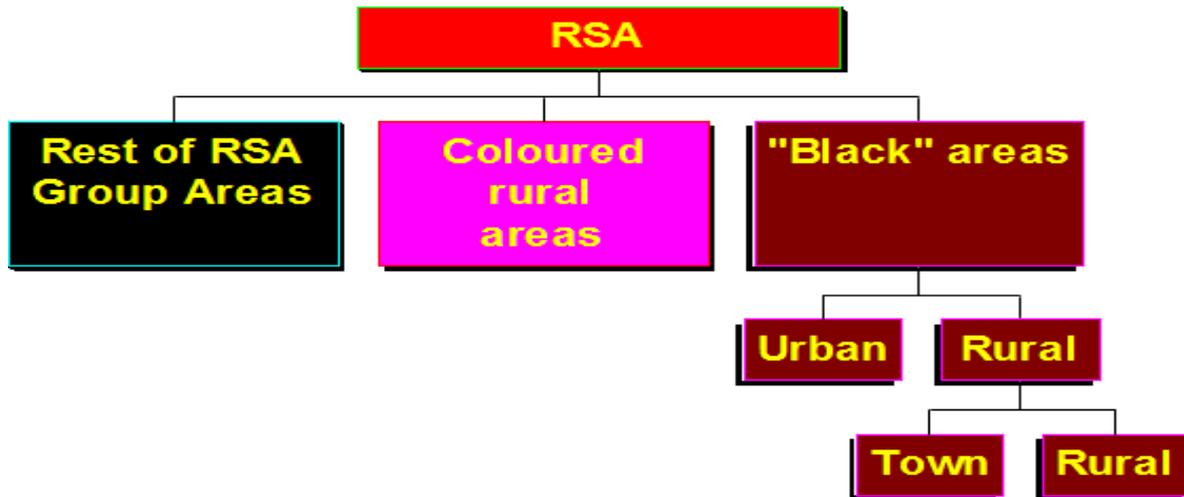
- conversion of individual community members' weak and insecure old order rights into registerable, secure and bankable new order rights.

The Communal Tenure Reform Sub-programme (category 4 above) has the objective of transferring in full ownership the communal areas in South Africa to the traditional communities concerned. The Act is currently subject to a constitutional challenge.

As land is a national competency (or functional domain) in terms of the Constitution of the Republic of South Africa, 1996, the national DRDLR (previously the Department of Land Affairs) is responsible for policy formulation, drafting of legislation and implementation. In a limited number of instances, delegations have been put into effect to a combined national-provincial entity in KwaZulu-Natal, the Ingonyama Trust.

In order to have a proper understanding of the existing forms of land tenure, it is necessary to provide a brief background to land tenure and land administration in South Africa. In many British-ruled colonies, the British colonial government introduced land tenure and land administration forms and systems that differed significantly from those applicable to the so-called Western model. These differentiated tenure forms and land administration systems were by and large race-based, and, from all perspectives, inferior to the survey and full ownership approach applied in respect of all other communities and land occupied by them.

In the case of South Africa, the following diagram gives an overview of the three main categories of land that was introduced by the British government, and defined by the successive South African government (segregationist) (1910-1948), Apartheid government (1948-1991) as well as the governments of the former "TBVC" entities and the six so-called self-governing territories:

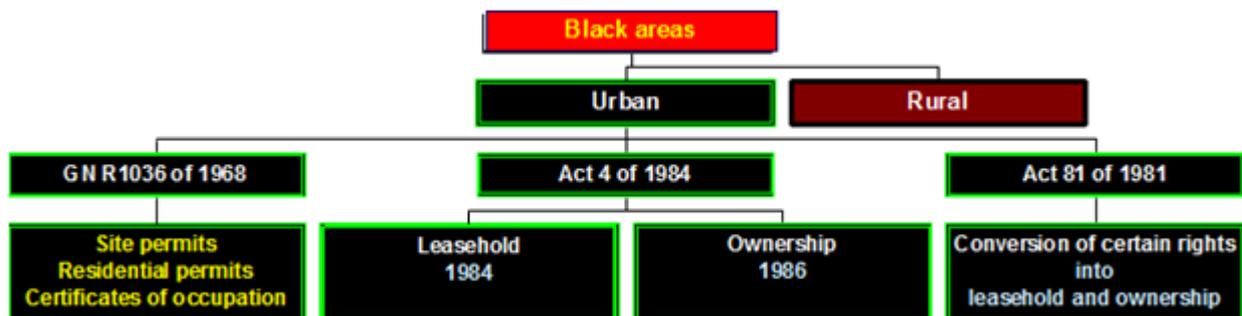


With regard to black South Africans, four main Acts regulated their rights to access land, to occupy land and to dispose of land. These were:

1. The Black Land Act 27 of 1913 (which provided for the allocation of 6% of the surface area of South Africa – the so-called scheduled areas set aside for exclusive black occupation. These areas were, at that point in time (1913), already densely occupied);
2. The Black Administration Act 38 of 1927 (which consolidated a special system of administration of all black South Africans; it provided for an own court structure, the recognition of traditional communities and traditional leadership systems, the power to issue proclamations and regulations dealing with every aspect of the lives of black people, etc.);
3. The Development Trust and Land Act 18 of 1936 (which provided for the removal of black South Africans from the remainder of South Africa outside the urban areas, and added another 7% of South Africa surface area to the 6% “scheduled areas” (see above). The 1936 “released areas” were to be acquired by a special purpose vehicle, the South African Development Trust, for eventual transfer to black people); and
4. The Blacks (Urban Areas) Consolidation Act 25 of 1945 (which provided for special tenure forms and special forms of land administration in the so-called urban areas of South Africa. It also provided that all black South Africans could only be legally present in those urban areas if in possession of the necessary authorization). This Act was repealed and replaced by the Black Communities Development Act 4 of 1984.

These so-called “pillars of apartheid” were repealed in 1991 (by means of the Abolition of Racially Based Land Measures Act 108 of 1991). However, the majority of subordinate legislation issued in terms of these four statutes, were not repealed in 1991. (Some of the other so-called “pillars of apartheid” were removed from 1986 onwards).

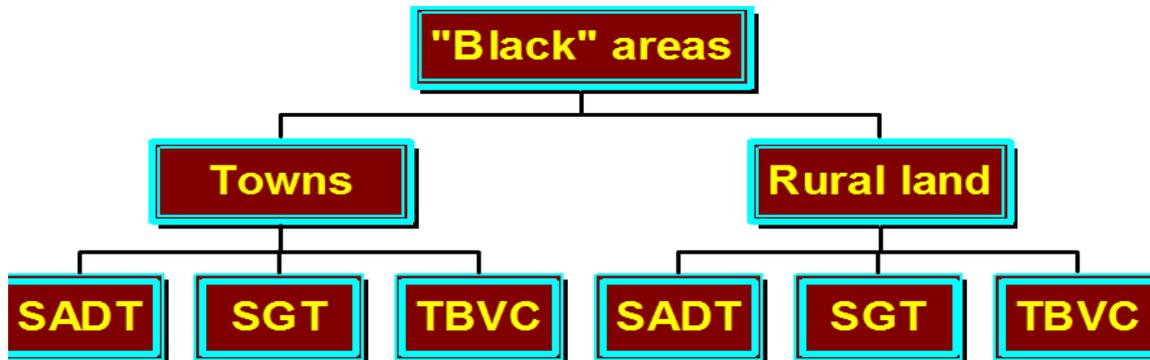
Compared to the tenure forms and land administration system that used to apply in areas regulated by the Group Areas Act 41 of 1950, a totally different system applied in respect of black South Africans. Surveying (which was done only into a very limited extent) was significantly inferior to that implemented in the remainder of South Africa, and tenure forms applicable to black South Africans were weak, insecure, and subject to discretionary administrative intervention (with recourse to courts of law excluded). Within this category, the distinction was made between (a) the former black urban areas, (b) the so-called homelands and (c) SADT (South African Development Trust) areas. The following diagram gives an overview of these former black urban areas:



In 1984, the Blacks (Urban Areas) Consolidation Act 25 of 1945 was replaced by the Black Communities Development Act 4 of 1984, which provided for the wide-scale registration of leasehold (but not full ownership). This necessitated the resurveying of each land parcel that was to be upgraded to leasehold. In 1986 the then prevailing political context in South Africa resulted in an amendment to the Black Communities Development Act 4 of 1984, which provided for conversion of the weak and unregistrable personal rights and interests into registerable western-type ownership. This process has now nearly been completed.

With regard to the 1913 scheduled and 1936 released areas set aside for exclusive occupation and acquisition of rights and interests by Black persons (which areas were consolidated into ten homelands (which, as set out above, eventually became the four so-called independent TBVC states and the six self-governing territories) and those areas that

could not be consolidated, remained as a separate category, referred to as the “SADT areas”), the following diagram provides an overview:



When the National Party became the government of South Africa (from 1948-1994) an ideological shift took place. It was decided that the scheduled and released areas should be consolidated in what was referred to as “Bantustans”, subsequently renamed as homelands, and finally as self-governing territories. With the exception of a number of “SADT areas” that could not be consolidated into these dual-political areas, ten homelands were created. The declared intention of the South African government was that they should attain full independence. However, only four of these territories (Transkei, Ciskei, Venda and Bophuthatswana) opted for so-called full independence. The other six self-governing territories acquired an extensive degree of self-governing powers in respect of a number of listed functional domains (which also included land within its jurisdictional area). Eventually, ownership of the land in the self-governing territories was transferred by the South African government to the governments concerned. This implied that said governments became responsible for both the allocation of rights and interests in, and the management of, such land.

Prior to the transfer of the functional domain of land (including its administration and rights of allocation) to the governments of the ten homelands, the South African government, by means of an intricate system of subordinate legislation, provided a differentiated set of tenure forms, surveying, registration and administration. This regulatory framework was in the course of time transferred to the individual governments of the various homelands. Some of these governments amended their inherited land tenure, surveying and administration regulatory frameworks; some governments replaced it with own legislation; and some governments continued with the implementation of inherited legislation as such.

By the early 1990s it was clear that there were ten distinct systems of land tenure and land administration in operation in the so-called homelands. In addition, another regulatory framework was in place in respect of the “SADT areas” (this subordinate legislation was issued by the central RSA government).

A further distinction (in respect of every homeland (the so-called independent TBVC countries, the six self-governing territories) and the “SADT areas”) must be made between towns and rural land.

In respect of the rural areas outside the towns located in the former TBVC countries, the other six self-governing territories and the “SADT areas”, the then existing national legislation was taken over, and, in some instances, amended or replaced. The main land tenure forms in the rural areas were communal tenure, quitrent and permission to occupy (PTOs).

Notwithstanding the repeal in 1991 of four of the pillars of the segregationist and apartheid approach to the establishment of differentiated (and inferior) systems of land tenure and land administration,<sup>24</sup> the subordinate legislation issued in terms of these four principal Acts has remained in place.

The 1993 Constitution explicitly provided for the continuation of old order legislation. This Constitution also provided a framework for the assignment of pre-1994 legislation to provincial governments to the extent that parts of the pre-1994 legislation fell within the provincial legislative and administrative domain. This resulted in the transfer of a number of pre-1994 principal and subordinate national, provincial and homeland statutory instruments to the provinces concerned (which would from then on be responsible for the administration of such provincialised legislation). It follows that significant parts of the racially-based pre-1994 land tenure systems legislation was assigned for the provinces to implement post 27 April 1994.

The 1996 Constitution (Schedule 6 Items 1-2) specifically provides for the continued application of all old order legislation, as well as interim (transitional) legislation (enacted during the interim phase 27 April 1994 to 4 February 1997 from the commencement date of

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<sup>24</sup> The Black Land Law 27 of 1913; the Black Administration Act 38 of 1927 (repealed in part); the Development and Trust Act 18 of 1936; and the Black Communities Development Act 4 of 1984,

the Constitution 200 of 1993, to that of the Constitution of the Republic of South Africa, 1996). The 1996 Constitution also reconfirmed that all assigned legislation became provincial legislation (which only provincial legislatures could then repeal, amend or replace).

The current land tenure and administration system in the jurisdictional areas previously referred to as homelands (the former TBVC countries and six self-governing territories) and “SADT areas” consists of various (predominantly old order race-based) systems.

In addition, pre-1994 legislation (from RSA and homeland origin) still determines the rights and interests to be obtained within towns and rural areas in the former homelands and “SADT areas”.

In light of the fact that both the interim 1993 Constitution and the final 1996 Constitution have provided that land is a national function, the ownership, in principle, of all land situated in the former homelands and “SADT areas”, has vested again in the central government.

### **C. EXAMPLES OF LEGISLATION AND ENSUING COMPLEXITY**

The Regulations for the Administration and Control of Townships in Black Areas, R293 of 1962, regulated the issuance of rights and permits in respect of towns within the former homelands, and initially, also in the former “SADT areas”. In a number of instances, the land tenure rights in these towns have been upgraded to ownership in terms of section 2 (read with Schedule 1) of the Upgrading of Land Tenure Rights Act 112 of 1991. Although the owners have title to the properties concerned, the rights are acquired and held in terms of RSA apartheid and homeland legislation.

As regards land in the deep rural areas (outside towns) in the former homelands and “SADT areas”, provision was made for quitrent and permissions to occupy. In addition to the general application of Proclamation R188 of 1969, some territories still applied legislation issued prior to 1969. A typical example is quitrent. Provision is made for quitrent (which is a limited real right) acquired and held in terms of the –

- (a) Black Areas Land Regulations, Proclamation R188 of 1969;
- (b) Proclamation 196 of 1920; and
- (c) Proclamation 170 of 1922.

As indicated above, a wide range of land-related race-based old order legislation was assigned to the provincial Premiers subsequent to the commencement of the Constitution of

the Republic of South Africa 200 of 1993. In addition, a significant number of such legislation have not been assigned, and still vest in the national sphere of government. Currently there is no inventory of all such legislation remaining at national level.

The situation in the former Transkei area would require special attention. PJA Carstens remarked that

It is clearly perceptible that an intricate process of land administration is constituted by the numerous proclamations with varying provisions which make it difficult for the community to perceive and the officials to carry out.<sup>25</sup>

**Proclamation R293 of 1963:**

Proc R293 was issued in terms of the Black Administration Act 38 of 1927. This Act is repealed by the Repeal of the Black Administration Act and Amendment of Certain Laws Act 28 of 2005. Section 1(6) of the Act states:

(6) Any (a) proclamation made under section 25(1) of the Act, including a proclamation validated by an Act of Parliament, and in force immediately prior to the commencement of section 5 of the Abolition of Racially Based Land Measures Act, 1991 ..., in an area, including a former self-governing territory ... is hereby repealed on (i) 31 July 2006; or (ii) such date as it is repealed by a competent authority, whichever occurs first.

It may be argued that Proclamation R293 has been repealed in all areas in South Africa outside the former TBVC states, as the 2005 Act has come into operation. (The compilers of this Annexure have, for purposes of the discussion of Proc R293, not expressed themselves on the constitutionality of the Repeal of the Black Administration Act and Amendment of Certain Laws Act 28 of 2005 in so far as this Act attempts to repeal laws that have become provincial laws (as contemplated in Schedule 6 of the Constitution of the Republic of South Africa, 1996)).

As indicated above, the then Minister of Land Affairs had authority over all pre-1994 land legislation. This includes the pre-1994 legislation of the self-governing territories and TBVC states. The President had to assign the legislation to the different provinces according to

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<sup>25</sup> "The Administrative Implications of Landownership in the Republic of Transkei' (1981) LLD dissertation, University of Pretoria.

section 235 read with Schedule 6 of the Constitution of the Republic of South Africa 200 of 1993.

According to *Ex Parte Western Cape Provincial Government and Others: In Re DVB Behuising (Pty) Ltd v North West Provincial Government and Another* 2000 (4) BCLR 347 (CC) referred to above, the North West Proclamation R293 (amended Bophuthatswana Proc R293) is no longer in force. The North West Province repealed the amended regulations assigned to them and with the Repeal of the Black Administration Act and Amendment of Certain Laws Act 28 of 2005, the remainder of the regulations that were regarded as legislation administered by the then Department of Land Affairs, were repealed. *Ex Parte Western Cape Provincial Government and Others: In Re DVB Behuising (Pty) Ltd v North West Provincial Government and Another* 2000 (4) BCLR 347 (CC) in no uncertain terms referred to the history of Proc R293 and its unacceptability in a post 1994 context (520D – 529B). The minority judgement of Goldstone, O'Regan and Sachs indicated as follow (542E - G):

It is logical that s 25(6) of the Constitution imposes the obligation of land tenure reform on the national Legislature. They myriad apartheid land laws, all characterised by pedantic detail created a labyrinthine system. The chaotic system was further compounded by the creation of the homelands, each with its own legislative provisions. The geographical location of those homelands has relatively little connection with current provincial lines. Some provinces have within their boundaries parts of two or more homelands. The complex legislative pattern that emerges renders the task of land reform a task that only the national legislature can undertake.

The minority decision also warned that (544H – 545D):

The meritorious desire manifested in the majority judgment for a clean sweep of the past in the name of modernisation and de-racialisation has an unintended and ironic consequence. It deprives underprivileged communities from gaining access to a cheap form of land tenure which in terms of national legislation can be upgraded to freehold. The Constitution requires government to foster access to land. The repeal of the proclamation by the North West province, in one sense at least, does the reverse.

Some of the other former self-governing territories have amended Proclamation R293. The question is whether this legislation could still be regarded as proclamations issued in terms of section 25 as stated by section 1(6) of the Amendment Act. By amending Proc R293, it became legislation of the former self-governing territory. Different versions of the Black Administration Act applied in the different regions as illustrated above.

As the specific amended proclamations were not assigned they are still to be regarded as national legislation. If they have been assigned, then only those provisions are assigned falling outside the scope of the national authority, which means that the provinces would be the competent authorities to repeal the legislation. If none of these proclamations refer were assigned, they would still have to be administered by the national DRDLR.

The following amended versions of Proclamation R293 existed:

- Proclamation R293 of 1962 as amended by the KwaNdebele General Law Amendment Act 14 of 1989 (KwaNdebele) (commencement date 1990-05-25)
- KwaNdebele Amendment Act on the Regulations for the Administration and Control of Towns 16 of 1988 (KwaNdebele) (commencement date 1990-03-16)
- Proclamation R293 of 1962 was amended a number of times by means of Government Notices, the last time by GN 8 of 1989-06-30 (OG 76 (KaNgwane)) (commencement date 1989-06-30)
- Ciskei Land Regulations Act 14 of 1982
- Venda Land Affairs (Town Establishment) Regulation (GN 33 OG 121 (Venda) 1992-09-04)
- Transkeian Townships Amendment Act 4 of 1969
- Bophuthatswana Townships Regulations Amendment Act 21 of 1981
- Bophuthatswana Townships Regulations Amendment Act 4 of 1982

It would seem that Lebowa and QwaQwa never amended Proc R293. Proc R293 was assigned to the then Provinces of Eastern Transvaal (Mpumalanga), Kwazulu/Natal and Northern Transvaal (Limpopo) during 1994 (those measures that fall within the scope of schedule 6 of the 1993 Constitution - Proc 162 in GG 16049 of 31 October 1994.), the Eastern Cape by Proc R111 of 1994 (Government Gazette No.15813 of 17 June 1994) and North West by Proc R110 of 1994 (Government Gazette No.15813 of 17 June 1994). The Bophuthatswana Townships Regulations Amendment Act 21 of 1981 and Bophuthatswana Townships Regulations Amendment Act 4 of 1982 were not only assigned to North West

(and later repealed – see above), but also to Mpumalanga and Free State and as far as could be established, they have not been repealed. Land parcels of the former Bophuthatswana have been included into the new provinces.

It seems that it was decided not to assign the amended proclamations but only the original Proclamation R293. However, when Proc R293 was subsequently amended, the different versions of Proclamation R293 were amended. Proclamation 9 that was issued in 1997 (Government Gazette No.17753 of 31 January 1997) amended the original Proc R293 as well as its amended versions to ensure a uniform deeds registry system. The regulations of Bophuthatswana were amended, the Ciskei Township Proclamation R293 of 1962; Proclamation R293 of the former Transkei; Venda, Gazankulu, KaNgwane, KwaNdebele, KwaZulu, Lebowa and QwaQwa. The amended versions were not assigned in terms of the (interim) Constitution of the Republic of South Africa 200 of 1993.

**Proclamation R188 of 1969, Proc R29-30 and GN 402-405:**

Proclamation R188 (Government Gazette No.2486 of 11 July 1969) issued in terms of section 25 of the Black Administration Act 25 of 1938, read with the South African Development Trust Act 18 of 1936, was assigned to the Provinces of the Eastern Cape, Mpumalanga (Eastern Transvaal), KwaZulu-Natal, Limpopo (Northern Transvaal), North West and Free State (Orange Free State) (as far as the measure fell within the scope of Schedule 6 of the 1993 Constitution – Proclamation R139 in Government Gazette No.15951 of 9 September 1994). Proc 9 of 1997 also amended Proc R188 and its amended versions to ensure a uniform registration system, namely Government Notice R188 of Bophuthatswana, QwaQwa, the Ciskei Land Regulations Act 14 of 1982, the Venda Land Affairs Proclamation 45 of 1990 and the KwaZulu Land Affairs Act 11 of 1992.

Proclamation R29-30 and GN 402-405, issued in terms of the South African Development Trust and Land Act 18 of 1936, are still in operation in terms of section 11(2) of the Abolition of Racially Based Land Measures Act 108 of 1991. Proclamation R29 and Government Notice 402 were assigned to the above provinces in 1994 (as far as the measure fell within the scope of Schedule 6 of the 1993 Constitution – Proc R139 in Government Gazette No.15951 of 9 September 1994). Proclamation R30 and Government Notice 403-405 were not assigned as far as can be established.

Proclamation R188 is a racially based land measure, attempting to reflect the communal land tenure system. It also discriminates against women and other members of the

community from obtaining land. The land rights are insecure. The rights are upgradable in terms of the Upgrading of Land Tenure Rights Act 112 of 1991, but being communal land, a traditional community resolution is required. (For a discussion of the Upgrading of Land Tenure Rights Act 112 of 1991, see par 2.69 and 2.70 of the main Report).

Proc R188 is provincial legislation. It was issued in terms of section 25 of the Black Administration Act 38 of 2007 and will be repealed in terms of the Communal Land Rights Act 11 of 2004 once it comes into operation. However, it may also have been repealed as a consequence of the commencement of the Repeal of the Black Administration Act and Amendment of Certain Laws Act 28 of 2005. If it has already been repealed at national level, it might have severe consequences in the provinces as it would impact on the transfer of communal land. It might also be necessary to provide for interim and transitional measures to protect vulnerable people as also stated by the minority decision in *Ex Parte Western Cape Provincial Government and Others: In Re DVB Behuising (Pty) Ltd v North West Provincial Government and Another* 2000 (4) BCLR 347 (CC).

#### **D. SUMMARY AND CONCLUSION**

##### **Proc R293:**

- Proclamation R293 was assigned to the Provinces in its original form and to the extent that it fell within the scope of schedule 6 of the 1993 Constitution.
- Proclamation R293 is a racially based land measure which contains discriminatory measures as was confirmed by *Ex Parte Western Cape Provincial Government and Others: In Re DVB Behuising (Pty) Ltd v North West Provincial Government and Another* 2000 (4) BCLR 347 (CC).
- The amended versions of Proc R293 were not assigned but were amended by Proc R9 of 1997 to provide for a uniform registration system.
- Certain chapters of Proc R293 are still administered nationally, i.e. as indicated by *Ex Parte Western Cape Provincial Government and Others: In Re DVB Behuising (Pty) Ltd v North West Provincial Government and Another* 2000 (4) BCLR 347 (CC), regulations 1 and 3 of Chapter 1 and Chapter 9.
- Proclamation R293 was (possibly) repealed by the Repeal of the Black Administration Act and Amendment of Certain Laws Act 28 of 2005 at the end of 2007.
- The question that remains is whether the former so-called homeland legislation (i.e. the amended versions of Proclamation R293) could also be

repealed as they were amended/issued by means of different Black Administration Acts.

- Another question is when a national act has been repealed, whether it also repeals assigned sub-ordinate legislation. According to *Ex Parte Western Cape Provincial Government and Others: In Re DVB Behuising (Pty) Ltd v North West Provincial Government and Another* 2000 (4) BCLR 347 (CC) only a province could repeal assigned legislation. The Black Administration Act 38 of 1927 was for example not assigned to the provinces except those sections dealing with traditional leaders and courts (Proclamation R139 in Government Gazette No.15951 of 9 September 1994). Would the effect of a national repeal be that subordinate, assigned legislation also be repealed?
- Another question that should be asked is whether there are measures in place to ensure that the repeal of Proclamation R293 does not leave a lacuna and vulnerable people unprotected.

#### **Proclamation R188:**

- Proclamation R188 is provincial legislation as the proclamation, as well as its amended versions, was assigned to the Provinces to the extent that it fell within the scope of schedule 6 of the 1993 Constitution. It is not clear which provisions are administered by national government.
- Proclamation R188 contains discriminatory measures but might (possibly) have been repealed by the Repeal of the Black Administration Act and Amendment of Certain Laws Act 28 of 2005, and if not, by the Communal Land Rights Act 11 of 2004.
- If already repealed, this leaves a lacuna and no protection for the vulnerable.
- A transitional and interim measure needs to be promulgated.

#### **E. RECOMMENDATION**

It is recommended that a focused task team (consisting of members with expertise and detailed knowledge regarding the pre-1994 land control and administration system) be appointed on an urgent basis to investigate, collect, inventorise and review all pre-1994 legal and administrative land matters that used to obtain (and to some extent still obtain) in the former homeland and "SADT areas". These laws, as indicated above, need to be rationalised on an urgent basis, as they are racially-based as regards their background, contents and current application. In addition, they do not provide security of tenure. The

proposed process should focus on the rationalisation and alignment of these special arrangements with the post-27 April 1994 constitutional, policy and legal frameworks, and where possible, the introduction of legislation with universal application.

**Annexure E****ABBREVIATIONS**

- ‘CLARA’** means **Communal Land Rights Act 11 of 2004**
- ‘DAFF’** means **Department of Agriculture, Forestry and Fisheries**
- ‘DFA’** means **Development Facilitation Act 67 of 1995**
- ‘DCGTA’** means **Department of Co-operative Governance and Traditional Affairs**
- ‘DHS’** means **Department of Human Settlements**
- ‘DPW’** means **Department of Public Works**
- ‘DRDLR’** means **Department of Rural Development and Land Reform**
- ‘DEA’** means **Department of Environmental Affairs**
- ‘SALRC’** means **South African Law Reform Commission**